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No. _____

In the
Supreme Court of the United States

COHL, STOKER, TOSKEY & MCGLINCHEY, P.C.,
Petitioner

V.

46th CIRCUIT TRIAL COURT,
Respondent

AND

OTSEGO COUNTY,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where a specially assigned state trial judge—who as chief judge of his own local court may well face the same financing problem as that presented by a plaintiff state trial court—exercises his discretionary authority to sanction a law firm representing the plaintiff court's defendant funding units under debatable circumstances, and is affirmed by a three-judge appellate panel, and on a further appeal an organization representing all the trial judges and all the Court of Appeals judges in that state seeks to participate as *amicus curiae* on the side opposite that of the sanctioned law firm and its clients, the judges' organization utilizing its status as an organization of state judges in a direct effort to influence that State's highest court to favor the plaintiff trial court's position, has the due process right to a fair hearing by a fairly constituted tribunal been so compromised that the sanctioned law firm is entitled to have the issue of sanctions revisited *ab initio* by a truly unbiased and disinterested judge?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner is the law firm of Cohl, Stoker, Toskey & McGlinchey, P.C., and Michigan professional corporation. The parties to the state proceedings at issue were petitioner Cohl, Stoker, Toskey & McGlinchey, P.C., the 46th Circuit Trial Court (a respondent herein, an amalgam of the circuit court for the counties of Crawford, Kalkaska, and Otsego, the 87th District Court, the Crawford County Probate Court, the Kalkaska County Probate Court, and the Otsego County Probate Court), and the three counties of Crawford, Kalkaska, and Otsego (with Otsego being the other respondent as to this petition).

There are no other corporations, limited liability companies, partnerships, limited partnerships, or juristic entities that are parties to this case. There are no natural persons party to this case.

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that state seeks to participate as *amicus curiae* on the side opposite that of the sanctioned law firm, utilizing its status as an organization of state judges in an effort to influence that State's highest court, has the due process right to a fair hearing by a fairly constituted tribunal been so compromised that the law firm is entitled to have the issue of sanctions revisited *ab initio* by a truly unbiased and disinterested judge? 11

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The Michigan Supreme Court's orders denying rehearing are officially reported at 477 Mich 1002 (2007) and 477 Mich 1007(2007), and are reproduced at Pet. Apx. 3a-4a and 7a (Appendices B and D).

The Michigan Court of Appeals' decision issued May 3, 2005 is officially reported at 266 Mich. App. 150, 702 N.W.2d 588 (2005), and is reproduced at Pet. Apx. 8a-51a (Appendix E), while that portion of particular importance to this petition appears at Pet. Apx. 36a-40a.

The 46th circuit court's (Michigan) order of May 30, 2003, imposing sanctions on Petitioner in favor of respondents , is reproduced at Pet. Apx. 52a-54a(Appendix F).

The 46th circuit court's (Michigan) opinion of May 30, 2003, imposing sanctions on Petitioner in favor of respondents , is reproduced at Pet. Apx. 55a-91a (Appendix G).

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment entered by the Michigan Court of Appeals on May 3, 2005, in this case, as to which the Michigan Supreme Court has declined discretionary review.

JURISDICTION

The Michigan Supreme Court denied petitioner's timely application for leave to appeal on November 1, 2006, and denied petitioner's timely motion for rehearing on January 29, 2007. The jurisdiction of this Court is based on 28 USC §1257(a) and Rule 13.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction and application of §1 of the Fourteenth Amendment, Pet. Apx. 306a (Appendix Q), as well as the potential application of 28 U.S.C. §§1443(1) and 1446(b) (Pet. Apx. 346a) (Appendix S).

STATEMENT

INTRODUCTION

Petitioner Cohl, Stoker, Toskey & McGlinchey, P.C., is a law firm, which was retained to represent two Michigan counties, Crawford and Kalkaska, in a lawsuit brought by their local consolidated courts, the 46th Circuit Trial Court ("46th CTC"), an entity representing an administrative consolidation of the 46th circuit court, the 87th district court, and the probate courts of Crawford, Kalkaska, and Otsego Counties[1] originally engendered by Michigan Supreme Court Admin Order 1996-9, 451 Mich. civ (Pet. Apx. 347a-349a) (Appendix T).

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[1] Initially the 83rd District Court, which then included Roscommon and Crawford Counties, was included, but the Michigan Legislature, by enacting Public Act 92 of 2002, revised the boundaries of the 83rd and 87th districts, Mich. Comp. L. §§600.8148 and 600.8152 (Pet. Apx. 349a) (Appendix U), and, insofar as relevant here, the geographic description of the territories and judicial entities included is correct.

Petitioner found itself dealing with a skeptical if not hostile assigned trial judge from another county, Hon. Dennis C. Kolenda, the chief judge of the Kent County circuit court (Michigan), a judge who might himself someday face the same sort of funding dispute with his local legislators. In the course of the litigation, that assigned judge twice took the highly unusual step of *sua sponte* questioning the legal or factual basis of actions taken by Petitioner on behalf of its clients—actions which the opposing parties had not seen fit to challenge—and, having invited respondents to file motions on grounds they had to that time overlooked or not regarded as meriting such action, then proceeded to sanction Petitioner for what that judge perceived as "frivolous" pleadings in violation of Michigan Court Rule 2.114(E) (Pet. Apx. 361a, Appendix V), a rule functionally identical to FRCivP 11.

On Petitioner's appeal of right of those sanctions rulings to the Michigan Court of Appeals, the penalties were affirmed as neither "clearly erroneous" nor "an abuse of discretion". 266 Mich. App. at 180-181 (Pet. Apx. 36a-40a) (Appendix E).

Subsequently, while various issues were still pending on remand to the assigned trial judge and to the Michigan Court of Appeals, quasi-official judicial organizations representing "all the trial judges" and "all the Court of Appeals judges" in Michigan (Pet. Apx. 93a) filed a motion to participate as *amici curiae* on the side of the 46th CTC (Appendix H). That belated revelation of actual bias in favor of the opposing party by a group including every one of the judges who actually ruled on the merits of the sanctions issues demonstrated that the 14th Amendment's guarantee of a fair hearing before a fair tribunal had been violated, and prompted Petitioner to file this petition for certiorari.

FACTUAL AND PROCEDURAL BACKGROUND

The 46th Circuit Trial Court ("46th CTC"), led by its then chief judge, Alton T. Davis (a member of the Michigan Court of Appeals since July 19, 2005, see 267 Mich App ix-x (2005)), claimed a right to additional funding of its operations on the basis of "inherent powers"[2] and contract. The contract claim was in part centrally predicated on an August 29, 2000 resolution passed by the Crawford County Board of Commissioners concerning retiree health care for employees of the 46th CTC. That resolution was the product of certain representations made by Rudi Edel, administrator of the 46th CTC, to the Crawford County Comptroller, Paul Compo, and the Crawford County Board of Commissioners as to the present cost of the benefit sought and the anticipated annual premium increase (4%) through the year 2017. Crawford's resolution was expressly linked to Edel's cost figures; however, the 46th CTC's complaint sought to compel Crawford to honor the contract according to the "true" cost figures, which were about 25% higher to start, with a much higher annual increase.

In defense of the contract claim, Petitioner obtained affidavits from each of the seven Crawford County commissioners, in which they all attested that, on August 29, 2000, they did not know, for a fact, that the cost figures supplied by Rudi Edel were incorrect and unreliable. Petitioner also obtained a copy of a memorandum, written by Rudi Edel on August 28, 2000 and addressed to his superiors, acknowledging that the true cost figure for retiree health care was 25% higher than the figure he provided to the Crawford County Board of Commissioners the very next day, that the expected annual increase was much greater

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[2] See *Wayne Circuit Judges v. Wayne Co (On Rehearing)*, 386 Mich. 1, 8-9, 190 N.W.2d 228 (1971) for a primer on Michigan's version of the "inherent powers" doctrine.

than 4%, and that to obtain approval of the plan it would be necessary to conceal these facts from Crawford County.

Petitioner, as counsel to Crawford and Kalkaska counties, accordingly answered the Complaint on behalf of Crawford and Kalkaska by interposing an affirmative defense of "innocent misrepresentation" under Michigan law.

Subsequently, a letter from the Crawford County Comptroller addressed to Peter Cohl, one of the principals of Cohl, Stoker, Toskey & McGlinchey, P.C., and dated more than a year after the August 29, 2000 meeting, came to light. Therein, the Comptroller—who was not a member of the Crawford County Board and did not vote on the August 29, 2000 resolution, but was present at the meeting—wrote that he thought some members of the Crawford County Board "knew" that Mr. Edel's numbers were incorrect, and that they worded their retiree health care resolution to "call his bluff." (Pet. Apx. 30a).

The lawsuit was assigned to be heard by Hon. Dennis C. Kolenda, chief judge of the Kent County circuit court (Michigan). Under Michigan law, trial judges are accorded broad discretion in sanctioning conduct by attorneys or parties they consider improper. MCR 2.114(E) (Pet. Apx. 361a, Appendix V).

Judge Kolenda *sua sponte* suggested to counsel for respondent 46th Circuit Trial Court that the Comptroller's letter indicated that the "claim" of "fraud" was without arguable basis in fact when raised, that as a matter of law there could have been no reliance[3], and that sanctions should

[3] Yet the Michigan Supreme Court noted that Crawford County's August 29, 2000 resolution approving retiree health care benefits was conditioned on the false cost figures posited by Mr. Edel, and for that reason there had

be imposed on Petitioner under MCR 2.114(E) (derived from FRCivP 11)[4]. Once a motion to that end was then filed by respondent court, Judge Kolenda granted it (Pet. Apx. 88a-89a).

Meanwhile, Otsego County, as "control unit" for the 46th CTC, which had supported the 46th CTC's funding requests, implemented two disputed enhanced benefits for all employees, an enhanced retroactive pension and the retiree health care benefit. This action, if legal, would have caused Crawford and Kalkaska Counties to be liable for additional funding for judicial operations that they had not appropriated, and which they did not have on hand or available as anticipated revenues. Under Michigan law, all municipalities must have balanced budgets; deficit budgets are unlawful. On behalf of Crawford and Kalkaska, therefore, and pursuant to the suggestion of the Michigan Department of Treasury [5] (which had attempted to mediate the dispute), Petitioner filed a third-party complaint for declaratory relief against Otsego on behalf of Crawford and Kalkaska, in which it was indicated that Otsego's action would cause Crawford and Kalkaska to violate the Michigan

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never been a "meeting of the minds" sufficient to give rise to any possible contract (Pet. Apx. 144a-146a, Appendix I) (see footnote 4 below).

[4] Although the Michigan Supreme Court never directly addressed the "fraud" claim, it did acknowledge that Mr. Edel's information was "in error", *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 137 (2006) (Pet. Apx. 101a-102a) (Appendix I), and held, contrary to Judge Kolenda's "finding", that Crawford County clearly relied on Edel's cost figures in its approving resolution, which meant that there was never a "meeting of the minds" to support any contract, 476 Mich at 158-159, Pet. Apx. 139a) (Appendix I).

[5] The Michigan State Treasurer's office attempted to mediate the dispute, and prepared a detailed analysis (Pet. Apx. 134a-144a, (Appendix J)) noting both that the 46th CTC's appropriations and cost figures were inconsistent with the Treasurer's audit (Pet. Apx. 138a), and that Otsego's unilateral action would cause Crawford and Kalkaska to violate the UBAA (Pet. Apx. 143a-144a).

Uniform Budgeting and Accounting Act (UBAA), Mich. Comp. L. §§141.421 *et seq.* (Pet. Apx. 352a-356a, Appendix W) by not having balanced budgets, and seeking a declaration that Crawford and Kalkaska were not obligated to make additional appropriations.

Again acting *sua sponte*, Judge Kolenda suggested to respondent Otsego County's attorney that petitioner's standing should be challenged (even though such an issue had been waived by not being raised in the county's first responsive pleading, pursuant to Michigan Court Rule 2.116(C)(5) and (D)(2) (Pet. Apx. 351a, Appendix V). Once Otsego County accepted that invitation and filed its motion, Judge Kolenda sanctioned Petitioner on grounds that neither Crawford nor Kalkaska had standing to assert a claim under the UBAA (Pet. Apx. 89a-90a, Appendix G); under the statute, only a prosecutor or the attorney general has standing to prosecute a violation of the statute and demand repayment of funds to the country treasury. Mich. Comp. L. §141.440 (Pet. Apx. 356a)[6]. Petitioner was ordered to pay Otsego's entire attorney fees and other costs, even though the UBAA was only mentioned in one of more than 100 paragraphs of the Complaint.

Altogether, sanctions in excess of $200,000 were imposed on Petitioner by Judge Kolenda[7].

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[6] Moreover, because neither Crawford nor Kalkaska had appropriated or paid any additional funds, there was nothing to recoup, and the action was declaratory in form, making the statutory restriction on suing for reimbursement irrelevant. Under accepted standing norms, Crawford and Kalkaska surely had standing to seek judicial construction of a governing statute in order to avoid a possible violation the law. *Massachusetts v. EPA*, ___ U.S. ___ ; 127 S. Ct. 1438, 1453 (2007); accord: *Associated Builders & Contractors v. Director, DCIS*, 472 Mich. 117, 127-128 (2005).

[7] Under Michigan practice, although a stay pending appeal was granted, the stay expired when the Michigan Supreme Court first denied leave to appeal. Mich. Ct. Rule 7.215(F)(1). Further, under Michigan practice a

Judge Kolenda proceeded to try the remaining issues, and he ruled in favor of the 46th CTC in all respects on each of its claims. On appeals of right, with Petitioner joined by undersigned counsel representing Crawford and Kalkaska Counties, and undersigned counsel representing Petitioner in its appeals of sanctions, Judge Kolenda's rulings were affirmed *in toto* by the Michigan Court of Appeals (Pet. Apx. 36a-40a, 49a, Appendix E) as not constituting an abuse of the trial court's discretion.

On further appeal to the Michigan Supreme Court, leave was granted as to the "inherent powers" and contract claims, with all other issues ordered held in abeyance. On leave granted, the Michigan Supreme Court reversed the lower courts, holding that there was "no evidence" to support an "inherent powers" claim (Pet. Apx. 119a,, 147a) and likewise neither a "meeting of the minds" nor consideration as a matter of law to support a contract claim (Pet. Apx. 144a-146a) (Appendix I).

After that ruling, however, the Michigan Supreme Court remanded other issues (concerning the 46th CTC's claim for attorney fees, and regarding apportionment of those fees among the three counties) to the Court of Appeals for reconsideration (Pet. Apx. 145a-148a) (Appendix K), but it denied leave as to the sanctions imposed on Petitioner (Pet. Apx. 1a-2a and 5a-6a) (Appendices A and C). Petitioner then timely moved for reconsideration.

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stay pending this petition for certiorari would not be granted. *Grievance Admin'r v. Fieger*, 477 Mich. 1228 (2007). Petitioner accordingly has fully paid the sanctions imposed, but has an absolute statutory (as well as common-law) right to recoupment if the judgments against it are set aside, vacated, or reversed for any reason. Mich. Comp. L. §600.1475. Therefore, this petition is not moot.

While the motions for reconsideration as to sanctions were pending, the Michigan Court of Appeals on December 21, 2006 issued a decision on remand regarding the 46th CTC's right to attorney fees. *46th Circuit Trial Court v. Crawford Co (On Remand)*, 273 Mich. App. 342 (2006). On behalf of Crawford and Kalkaska Counties, Petitioner and undersigned counsel filed an application for leave to appeal with the Michigan Supreme Court, challenging that ruling, which became Michigan Supreme Court Docket Nos. 132986-132988.

On January 29, 2006, the Michigan Supreme Court denied Petitioner's motions for reconsideration as to sanctions (Pet. Apx. 3a and 7a). On February 13, 2006, the Michigan Judges Association (MJA), Michigan Probate Judges Association (MPJA), and Michigan District Judges Association (MDJA) moved for permission to appear as *amici curiae* in opposition to Crawford and Kalkaska Counties' application for leave to appeal (Pet. Apx. 91a-95a) (Appendix H) in Michigan Supreme Court Nos. 132986-8. That motion and the proffered brief that accompanied it were signed by attorney Hilda R. Gage, who had been a judge of the Michigan Court of Appeals until her retirement effective January 15, 2006.

In their motion for leave to appear as *amici*, the Associations stated that the Michigan Judges Association (MJA) is an organization representing "all the trial judges and all the Court of Appeals judges" in Michigan (Pet. Apx. 92a). It eventuates that the 46th CTC's original chief judge, Alton T. Davis (who was appointed to the Michigan Court of Appeals on July 19, 2005[8], see 267 Mich App x), was successively Secretary, Vice-President and President of the

[8] The Michigan Court of Appeals decided the sanctions issues prior to the time Judge Davis became a member of that Court, but while Judge Gage was serving on the Court.

Michigan Judges Association (Pet. Apx. 150a, 152a, 153a) (Appendix L), and that Judge Kolenda is currently a member of the Rules Committee of the MJA (Pet. Apx. 180a) (Appendix N).

REASONS FOR GRANTING THE PETITION

This Court has, infrequently but with some regularity, been called upon to protect the fundamental 14th Amendment right of persons in State proceedings to due process, being a "fair hearing before a fair tribunal". *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (also a Michigan case); *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 617, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993) ("due process requires a 'neutral and detached judge in the first instance' ") This Court has performed its bedrock function as the Court of last resort in striking down State judgments that reflected participation by judges, trial and appellate, who had incentives to be less than impartial. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *Ward v. Monroeville*, 409 U.S. 57, 58-62, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972). This Court has underlined essential constitutional guarantee of fundamental fairness "may not be eroded" either by the States or the federal government. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004).

Here, Petitioner has been subjected to discretionary sanctions suggested *sua sponte* with debatable justification[9]

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[9] Petitioner recognizes that the substantive propriety of the sanctions imposed is a question of Michigan law over which this Court has no jurisdiction. *Arizona v San Carlos Apache Tribe*, 463 U.S. 545, 561, 103 S. Ct.. 3201, 3210, 77 L. Ed. 2d 837 (1983). But this Court can at least take note that compelling arguments against those sanctions were made by Petitioner in the Michigan courts (Pet. Apx. 164a-234a and 235a-305a) (Appendices O and P), and that fair-minded, impartial judges who

by a Michigan circuit judge who not only had incentive to favor the opposition (fellow judges) because he might some day have a dispute with his own county over funding issues, but who, through an organization, now seeks to take sides in the dispute, and to side with Petitioner's opposition. Judge Kolenda's exercise of discretion has been upheld by Michigan Court of Appeals judges who also are members of the same organization of judges that seeks to take sides in the dispute, and to side with Petitioner's opposition. This blatant disregard of the veil of judicial impartiality came to light only after the Michigan Supreme Court had denied Petitioner's motion for reconsideration as to sanctions (thus leaving Petitioner no further avenue under Michigan procedure for redress of the constitutional issue), but it reflects preexisting biases.

Issue I: Where a specially assigned state trial judge—who as chief judge of his own local court may well face the same problem as that presented by a plaintiff state trial court—exercises his discretionary authority to sanction a law firm under debatable circumstances, and is affirmed by a three-judge appellate panel, and subsequently an organization representing all the trial judges and all the Court of Appeals judges in that state seeks to participate as *amicus curiae* on the side opposite that of the sanctioned law firm, utilizing its status as an organization of state judges in an effort to influence that State's highest court, has the due process right to a fair hearing by a fairly constituted tribunal been so compromised that the law

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approached the issue in a detached and neutral fashion might well have reached a different conclusion. Thus, although the propriety of the substantive ruling based on Michigan law is not before this Court, the validity of the process of making that state law determination by judges whose bias has been belatedly revealed is properly here for consideration based on the 14th Amendment. *Ohio v Reiner*, 532 U.S. 17, 20, 121 S. Ct. 1252, 149 L. Ed. 2d 158 (2001) and cases there cited.

firm is entitled to have the issue of sanctions revisited *ab initio* by a truly unbiased and disinterested judge?

ISSUE PRESERVATION

Michigan applies the common-law "rule of necessity", *Bliss v. Caille Bros. Co.*, 149 Mich. 601, 113 N.W. 317 (1907); *Champion's Auto Ferry, Inc. v Michigan Public Service Comm'n.*, 215 Mich. App. 699, 709-710; 588 N.W.2d 153 (1998) which this Court has similarly recognized. *United States v. Will*, 449 U.S. 200, 212-213, 101 S. Ct. 471, 66 L. Ed. 2d. 392 (1980). Under that rule, when all judges are equally disqualified, none is so disqualified, in order to avoid a situation in which the case otherwise cannot be heard at all.

But this is not such a case. The Michigan Constitution provides for the *ad hoc* assignment by the Michigan Supreme Court of "persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments". Mich. Const. 1963, art. 6, §23 (Pet. Apx. 357a, Appendix X). The Michigan Legislature has authorized the Michigan Supreme Court to assign retired judges "to perform judicial duties in any court in the state." Mich. Comp. L. §600.226(1) (Pet. Apx. 358a, Appendix Y). Of crucial importance, retired or other former elected judges are not, at least by the definitions of the three Michigan judges associations, necessarily current members of those groups (although all—with the possible exception of former Michigan Supreme Court justices who did not serve in a judicial capacity in a lower court—are no doubt former members).

Petitioner, on its own behalf and for its clients, did argue on appeal that Judge Kolenda, as an active circuit judge who might well some day find himself involved in a similar dispute with his own county board of commissioners over funding issues, especially in his role as chief judge, was not

"disinterested" as required by a Michigan Supreme Court administrative order that governs "inherent powers" lawsuits filed by Michigan trial courts. See 266 Mich App at 181 (Pet. Apx. 40a). Michigan law also provides that a judge is disqualified only on the basis of "actual bias", *Cain v Dep't of Corrections*, 451 Mich. 470, 495; 548 N.W.2d 210 (1996), and the burden of proving the existence of such actual bias is on the litigant challenging a judge's impartiality. *Id.*, 451 Mich. at 497. In that regard, rulings made during the course of a lawsuit are held not to constitute proof of actual bias except under extraordinary circumstances. *Id.*, 451 Mich at 496, quoting *Liteky v. United States*, 510 U.S. 540, 550, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

Thus, prerequisite evidence of actual bias became apparent and available to Petitioner only when the three associations of Michigan judges filed their motion to participate as *amici curiae*, after the Michigan Supreme Court had declined on reconsideration to grant discretionary review of the sanctions imposed upon Petitioner. Thus, the issue here presented arose too late to be included in prior proceedings, because the prerequisite conclusive evidence of actual bias was unavailable to petitioner until February 13, 2007.

ANALYSIS

This case presents a question as to the application of US Const, Amendment 14 (Pet. Apx. 306a, which prohibits the states from denying anyone due process of law.

The Michigan Judges Association ("MJA") is an assumed name of Michigan Judges Association, Inc., a non-profit corporation formed in 1983 (Pet. Apx. 155a-159a, Appendix M). The Michigan District Judges Association ("MDJA") and Michigan Probate Judges Association ("MPJA") are not incorporated in Michigan, according to the public records of

the Michigan Department of Labor and Economic Growth, so they appear to be mere voluntary associations. The Michigan Judges Association in particular, although not created by statute, court rule, or administrative order, has been accorded privileged status by virtue of Rule 2 of the Rules Concerning the Judicial Conference of Michigan (Pet. Apx. 359a) (Appendix Z), which makes the President of the MJA a director of the conference. A State Bar of Michigan regulation likewise permits each association to name at least one member to serve on the Standing Committee on Professional and Judicial Ethics.

Article II of the MJA's Articles of Incorporation proclaims its purpose as being "to promote the general welfare of the membership and the administration of justice and to bring the judges into a closer relationship with one another"(Pet. Apx. 155a). Encouraging fraternity and socialization among judges who will be ruling upon claims filed by one another against third parties may be designed to promote the welfare of judges personally, but can hardly be said to further the administration of "justice". A system of justice administered by a group of friends for their mutual benefit and in furtherance of their relationships with one another is a complete contradiction in terms.

As this Court held in *Republican Party of Minnesota v. White*, 536 U.S. 735, 775-776, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002):

> One meaning of "impartiality" in the judicial context--and of course its root meaning--is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the

traditional sense in which the term is used. See Webster's New International Dictionary 1247 (2d ed.1950) (defining "impartial" as "[n]ot partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just"). It is also the sense in which it is used in the cases cited by respondents and *amici* for the proposition that an impartial judge is essential to due process. *Tumey v. Ohio*, 273 U.S. 510, 523, 531-534, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Aetna Life Ins. Co. v. Lavoïe*, 475 U.S. 813, 822-825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) (same); *Ward v. Monroeville*, 409 U.S. 57, 58-62, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) (same); *Johnson v. Mississippi*, 403 U.S. 212, 215-216, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971) *(per curiam)* (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracy v. Gramley*, 520 U.S. 899, 905, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); *In re Murchison*, 349 U.S. 133, 137-139, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (judge violated due process by sitting in the criminal trial of defendant whom he had indicted).

Of course, once Judge Kolenda *sua sponte* resolved to invite motions to impose sanctions on Petitioner, Petitioner became a party, at least to that extent, and the same principles must therefore apply. Any other result would mean that a judge may properly be biased against the lawyers for a party, or alternatively that unconstitutional bias against a party somehow magically evaporates when

the judge turns his attention to that party's attorney(s). Petitioner surely did not receive impartial application of the law to itself the same as it "applies to any other party."

What judges may not do individually, surely they may not do collectively, and vice versa. The effort by the Michigan Judges Association, on behalf of each of its members (including Judge Kolenda and the three Court of Appeals judges who upheld his sanctions rulings against Petitioner), to insert itself (and themselves) directly into the center of litigation, as advocates on the side of the opposing judicial party, reveals the presence of a level of bias, arising from both parochial and personal financial concerns as well as institutional imperatives, that is inconsistent with due process requirements under the 14th Amendment.

As this Court held in *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., supra,* 508 U.S. at 617-618 (emphasis added):

> "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule." *Tumey v. Ohio,* 273 U.S. 510, 522, 47 S. Ct. 437, 441, 71 L. Ed. 749 (1927). **Before one may be deprived of a protected interest,** whether in a criminal or civil setting, see *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242, and n. 2, 100 S. Ct. 1610, 1613, and n. 2, 64 L. Ed. 2d 182 (1980), **one is entitled as a matter of due process of law to an adjudicator who is not in a situation " 'which would offer a possible temptation to the average man as a judge ... which might lead him not to hold the balance nice, clear and true....' "** *Ward, supra,* 409 U.S. at 60, 93 S. Ct. at 81 (quoting *Tumey, supra,* 273 U.S., at 532, 47 S. Ct., at 444). **Even appeal and a trial *de novo* will not cure a**

failure to provide a neutral and detached adjudicator. 409 U.S., at 61, 93 S. Ct. at 83.

> **"[J]ustice," indeed, "must satisfy the appearance of justice,** and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Marshall v. Jerrico, Inc., supra,* 446 U.S., at 243, 100 S.Ct., at 1613 (citations and internal quotation marks omitted).

By their own description (Pet. Apx. 93a, motion ¶3), the three judicial associations "represent the interests of all Michigan trial and Court of Appeals judges." Their joint *amici* petition stands as a confession that an organization representing "all [Michigan] Court of Appeals judges" and all Michigan circuit judges, *inter alia,* desires to take a position alongside that of the 46th Circuit Trial Court in the underlying litigation, **at a time when the Michigan Court of Appeals still had pending before it four cases on remand,** see 46th *Circuit Trial Court v. Crawford Co,* 477 Mich. 920 (Case 3), 921, and 922 (2006), and in conjunction with review of the Court of Appeals' first decision on remand pursuant to 46th *Circuit Trial Court v. Crawford Co,* 477 Mich. 920 (Case 2) (2006). Likewise, the Michigan Judges Associations claims to represent "all trial judges", yet certain motions after remand are already pending before Judge Kolenda, and there is a trenchant possibility that additional issues will arise before him.

The belated appearance of the three judicial associations on the side of the 46th CTC undermines the validity and reliability of all prior discretionary (or other) adjudications performed by their members, not the least being the various sanctions imposed on Petitioner in large part *sua sponte* by Judge Kolenda, and upheld by the Michigan Court of

Appeals as being neither "clearly erroneous" nor an "abuse of discretion". Suddenly, there is an explanation for the fact that, during oral argument in the Michigan Court of Appeals in the appeals of right, two of the Michigan Court of Appeals judges literally shouted down counsel for the Crawford, Kalkaska and Petitioner consistently as he strove to answer their questions (Pet. Apx. 309a-344a, Appendix R) contrary to Michigan Code of Judicial Conduct Canon 3A(8) ("A judge should avoid interruptions of counsel in their arguments except to clarify their positions, and should not be tempted to the unnecessary display of learning or a premature judgment." Pet. Apx. 360a, Appendix AA)[10].

A more unseemly and ill-timed intervention as purported *amici* could hardly be imagined. Instead of a remand for reconsideration before panels of appellate judges who are constitutionally obligated to be neutral toward the parties, or to a trial judge required by Michigan Supreme Court Administrative order to be "disinterested", Mich S Ct Admin Order 1998-5 (Pet. Apx. 40a) and equally constitutionally restricted to being fair and impartial, *In re Murchison, supra*, 349 US at 136, Petitioner finds itself sanctioned by a trial judge, and those sanctions upheld by a panel of appellate judges, all of whom now seek to participate in the underlying litigation and to take the side of the opposing party – their judicial confreres of the 46th CTC – and to lend their weight in support of the 46th CTC on both substantive and policy grounds. Clearly, Petitioner has been denied due process of law, the most basic requirement of which is a fair hearing before a fairly composed tribunal.

---

[10] This is entirely aside from the failure to be "patient, dignified and courteous to litigants, * * * lawyers and others with whom the judge deals in an official capacity", Michigan Code of Judicial Conduct, Canon 3A(3), Pet. Apx. 360a.

As this Court famously held in *In re Murchison, supra*, 349 US at 136, reversing a prior failure by the Michigan Supreme Court to provide a remedy when a lower court judge crossed the constitutional line:

> **A fair trial in a fair tribunal is a basic requirement of due process.** Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end **no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.** That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "**Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true** between the State and the accused **denies** the latter **due process of law.**" *Tumey v. State of Ohio*, 273 US 510, 532; 47 S Ct 437, 444; 71 L Ed 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. **But to perform its high function in the best way "justice must satisfy the appearance of justice."** *Offutt v. United States*, 348 US 11, 14; 75 S Ct 11, 13.

Equally, a fair hearing in an appellate tribunal like the Michigan Court of Appeals is a basic requirement of due process under US Const, Amendment 14, and protectable in federal court as a federal right, *Fieger v. Ferry*, 471 F3d 637, 643-644 (2006). Any such fair hearing requires an "absence of actual bias" at both the trial and appellate levels. Allowing an initial, discretionary determination by a trial judge, and review thereof by appellate judges, all of whom

are members of a judicial organization which affirmatively sides with one of the parties, represents something substantially worse than "a possible temptation to the average [person] as a judge not to hold the balance nice, clear and true between" the competing parties. The results of such constitutionally flawed proceedings unquestionably fail to "satisfy the appearance of justice."

Clearly, Judge Kolenda as well as the reviewing judges of the Michigan Court of Appeals were subject to "temptations * * * not to hold the balance nice, straight, and true" between Petitioner and the 46th CTC (and Otsego County, which marched in lockstep with the 46th CTC throughout), and the result is that Petitioner was denied due process of law.

The three judicial associations and their members (from whom they are indistinguishable) completely lost sight of the essential principle that adjudicators must be neutral in fact as well as appearance. Even if the unseemly appearance of injustice were by itself inadequate grounds to find a due process violation under the 14th Amendment, the clear tacit admission of actual bias must surely suffice. When judges other than those directly involved as parties to the litigation, including those fulfilling an adjudicator's role, seek to side with their colleagues as *amici curiae*, clearly all sense of judicial propriety, decorum, fairness, and neutrality has been suborned, to the everlasting shame of Michigan's "one court of justice", Mich. Const 1963, art 6, §1 (Pet. Apx. 357a).

In effect, the Michigan Court of Appeals has revealed that its judges, together with Judge Kolenda, wish to participate in the underlying litigation as advocates for one party. Inasmuch as Petitioner has borne the brunt of Judge Kolenda's *sua sponte* imposition of sanctions, upheld by the Michigan Court of Appeals as within his discretion, all

participating judges in those decisions are now seen to have been permeated with preconceived bias against Petitioner to an extent that is wholly unprecedented. The most fundamental due process principles of the Fourteenth Amendment now require reversal and remand for a hearing *ab initio* before a truly impartial and neutral arbiter, if one can be found.

Petitioner notes that, had the evidence of actual bias been available before the entry of final judgment by Judge Kolenda, it would have had a right to remove the case to the federal district court under 28 U.S.C. §1443(1), by invoking its rights under 28 U.S.C. §1446(b) ("If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable * * * ".) (Pet. Apx. 346a, Appendix S). The delayed revelation of judicial bias ought not operate to deny Petitioner its federal constitutional and statutory right to a fair hearing in a fair tribunal of any claim for sanctions against it.

CONCLUSION

For the foregoing reasons, Cohl, Stoker, Toskey & McGlinchey, P.C. respectfully prays that its petition for certiorari be granted, or alternatively, pursuant to Supreme Court Rule 16.1, that the Court summarily reverse the lower court orders in this cause and direct that any motion or request for sanctions be addressed *ab inito* after the case is assigned to a truly neutral and unbiased judge, either through Mich. Const. 1963, art. 6, §23 (Pet. Apx. 357a, Appendix X), Mich. Comp. L. §600.226 (Pet. Apx. 358a, Appendix Y), or 28 U.S.C. §1443(1) (Pet. Apx. 346a, Appendix S).

Respectfully submitted

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- 2

Supreme Court, U.S.
FILED

061417 APR 20 2007

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

COHL, STOKER, TOSKEY & MCGLINCHEY, P.C.,
Petitioner

V.

46th CIRCUIT TRIAL COURT,
Respondent

AND

OTSEGO COUNTY,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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Order

Entered: Nov. 1, 2006

128882

46th Circuit Trial Court
Plaintiff, Counter-Defendant, Third-Party Plaintiff-Appellee

v

County of Crawford and Crawford County Board of Commissioners
Defendants,

and

Kalkaska County,
Third Party Plaintiff,
Counter-Defendant,

and

County of Otsego,
Third Party Defendant-Appellee

Cohl, Stoker, Toskey & McGlinchey, P.C.,
Appellant.

_____/

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 1228882
COA: 254181
Crawford CC: 02-005951-CZ

By order of December 28, 2005, the application for leave to appeal the May 3, 2005 judgment of the Court of Appeals was held in abeyance pending the decision in *46th Circuit Trial Court v Crawford County* (Docket No. 128878). On order of the Court, the case having been decided on July 28,

2006, 476 Mich 131 (2006), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we VACATE in part the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals, which shall hold this case in abeyance pending its decision on remand in *46th Circuit Trial Court v Crawford County* (Court of Appeals Docket Nos. 246823, 248593 and 251390). If, after *46th Circuit Trial Court v Crawford County* is decided on remand, the Court of Appeals determines that Kalkaska and Crawford Counties are responsible for the 46th Circuit Trial Court's attorney fees, the Court of Appeals shall consider whether Kalkaska and Crawford Counties should be liable for sanctions when they will be responsible for the fees of the attorneys that responded to the sanctionable pleadings. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

The motions for immediate consideration and for peremptory reversal are DENIED. The remaining motion for miscellaneous relief is GRANTED. A public question being involved, and in light of the relationships between the parties, no costs are awarded.

KELLY, J., would deny leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 1, 2006 /s/ Corbin A. Davis

Clerk

Order

Entered: Jan. 29, 2007

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

128882

46th Circuit Trial Court
Plaintiff, Counter-Defendant, Third-Party Plaintiff-Appellee

v

County of Crawford and Crawford County Board of Commissioners
Defendants,

and

Kalkaska County,
Third Party Plaintiff,
Counter-Defendant,

and

County of Otsego,
Third Party Defendant-Appellee

Cohl, Stoker, Toskey & McGlinchey, P.C.,
Appellant.

SC: 1228882
COA: 254181
Crawford CC: 02-005951-CZ

_____/

On order of the Court, the motion for reconsideration of this Court's November 1, 2006 order is considered, and it is GRANTED. In light of the fact that the circuit court did not impose sanctions on Kalkaska or Crawford Counties in this case, but only imposed sanctions on Cohl, Stoker, Toskey & McGlinchey, P.C., and the parties concede that if sanctions

are paid by Cohl, Stoker, Toskey & McGlinchey, P.C., the 46th Circuit Trial Court will not receive a double recovery of its attorney fees, we VACATE that part of our November 1, 2006 order that vacated the Court of Appeals opinion in part and remanded this case to the Court of Appeals. On reconsideration, the application for leave to appeal the May 3, 2005 judgment of the Court of Appeals is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 29, 2007 /s/ Corbin A. Davis
Clerk

Order

Entered: Jan. 29, 2007

128884 & (84)

County of Crawford and
County of Kalkaska,
Plaintiffs

v

County of Otsego,
Defendant-Appellee

and

Cohl, Stoker, Toskey & McGlinchey, P.C.,
Appellant.

_____/

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 1228884
COA: 254182
Crawford CC: 02-010014-CZ

By order of December 28, 2005, the application for leave to appeal the May 3, 2005 judgment of the Court of Appeals was held in abeyance pending the decision in *46th Circuit Trial Court v Crawford County* (Docket No. 128878). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 131 (2006), the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

The miscellaneous motion is GRANTED. A public question being involved, and in light of the relationships between the parties, no costs are awarded.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 1, 2006 /s/ Corbin A. Davis
Clerk

Order

Entered: Jan. 29, 2007

128884(88)

County of Crawford and
County of Kalkaska,
Plaintiffs

v

County of Otsego,
Defendant-Appellee

and

Cohl, Stoker, Toskey & McGlinchey, P.C.,
Appellant.

_____/

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 1228884
COA: 254182
Crawford CC: 02-010014-CZ

On order of the Court, the motion for reconsideration of this Court's November 1, 2006 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 29, 2007 /s/ Corbin A. Davis
Clerk

STATE OF MICHIGAN
COURT OF APPEALS

46TH CIRCUIT TRIAL COURT,

Plaintiff/Counter-Defendant/ThirdParty-Plaintiff-Appellee,

v

COUNTY OF CRAWFORD and CRAWFORD COUNTY BOARD OF COMMISSIONERS,

Defendants/Counter-Plaintiffs/ Third-Party-Plaintiffs-Appellants,

COUNTY OF KALKASKA,

Third-Party-Plaintiff/ CounterDefendant-Appellant,

and

COUNTY OF OTSEGO,

Third-Party-Defendant-Appellee.

FOR PUBLICATION
May 3, 2005
9:05 a.m.

No. 254179
Crawford Circuit Court
LC No. 02-005951-CZ

COUNTY OF CRAWFORD and COUNTY OF KALKASKA,

Plaintiffs-Appellants,

v

COUNTY OF OTSEGO,

Defendant-Appellee.

No. 254180
Otsego Circuit Court
LC No. 02-010014-CZ

[*2] 46TH CIRCUIT TRIAL COURT,

Plaintiff/Counter-Defendant/Third Party-Paintiff-Appellee,

v

No. 254181
Crawford Circuit Court
L.C. No. 02-011004-CZ

COUNTY OF CRAWFORD and CRAWFORD COUNTY BOARD OF COMMISSIONERS,
Defendants/CounterPlaintiffs/
Third-Party-Plaintiffs,

COUNTY OF KALKASKA,
Third-Party-Plaintiff/CounterDefendant,

COUNTY OF OTSEGO,
Third-Party-Defendant-Appellee,

and

COHL STOKER TOSKEY & MCGLINCHEY PC,
Appellant.

COUNTY OF CRAWFORD and COUNTY OF KALKASKA,
Plaintiffs,

v

No. 254182
Otsego Circuit Court
LC No. 02-010014-CZ

COUNTY OF OTSEGO,
Defendant-Appellee,

And

COHL STOKER TOSKEY & MCGLINCHEY PC,
Appellant.

Before: Zahra, P.J., and Neff and Cooper, JJ.

COOPER, J.

Kalkaska and Crawford Counties and the Crawford County Board of Commissioners (the Counties) appeal as of right in these consolidated appeals from various orders and the judgment entered by Judge Dennis Kolenda (the lower court) in the litigation pursued by the 46th Circuit Trial Court (the Trial Court) seeking adequate funding. The Counties also appeal from various orders entered in the related suit filed by the Counties against Otsego County, the control unit for the Trial Court. We affirm.

[*4] I. Facts and Procedural Background

These consolidated cases arise out of a funding dispute between the Trial Court and two of its funding units—the Counties. A detailed narrative of much of the history of this case is provided in *46th Circuit Trial Ct v Crawford Co*,[1] an opinion issued by this Court following an interlocutory appeal. In that appeal, this Court affirmed the lower court's award of attorney fees to the Trial Court based on its inherent power to seek adequate funding. While that appeal was pending, however, this case proceeded in the lower court.

The 46th Circuit Trial Court was created by order of the Michigan Supreme Court as an experiment in consolidating the various levels of trial courts into one, unified trial court system.[2] The 46th Circuit was the only multi-county experimental court created and included Otsego, Crawford, and Kalkaska counties. During the early stages of unification, the Trial Court concluded that all employees, regardless of the county in which they physically worked, should earn equal pay and receive equal benefits. Wages needed to be redetermined, as many positions had been eradicated and others had taken on consolidated

functions. Consequently, in the summer of 2000, Chief Judge Alton Davis asked the employees to make cost-saving concessions to serve as a bargaining chip in securing the funding units' approval of a retiree healthcare plan and an improved pension plan. The employees agreed to phase out longevity pay and dedicate a portion of all future wage increases to fund the retiree benefits package. Employees also agreed to accept a cost-saving PPO that offered less coverage and had a higher prescription co-pay. Following the funding units' passage of resolutions approving these plans, the Trial Court implemented the employee concessions at substantial savings to the Trial Court and its funding units.

During the August 29, 2000 meeting, at which the Crawford County Board of Commissioners passed resolutions approving the plans, the commissioners voiced their concerns about becoming financially responsible for potential future unfunded liability and over the low figure represented as the annual retiree payment cap.[3] Judge Davis promised to put a "failsafe" provision in writing to outline the method of handling any unfunded liabilities. Despite these concerns, the Board passed the following resolutions at the conclusion of the meeting:

> MOTION by Hanson, seconded by Beardslee, to authorize the County [to] pay 24% of $50,000 ($12,000) for the year 2000 and that payment will increase at 4% per year until 2017, and at that time will pay an estimated $94,649 and that the Blue Cross/Blue Shield medical supplement payment per individual would be

---

1 *46th Circuit Trial Court v Crawford Co*, 261 Mich App 477;

682 NW2d 519 (2004), lv held in abeyance 687 NW2d 297 (2004) (pending the resolution of these consolidated appeals).

2 As will be discussed in further detail later, the "demonstration project" status of the Trial Court ended in 2004; however, the Trial Court continues to function as a unified court system.

3 Judge Davis told the Board that each retiree would be entitled to $4,087 per year; however, the Board was aware that the correct figure was over $1,000 more.

> [*5] capped at [sic] the year 2000 at $4,087.00 [and] would increase at 4% per year until 2017 for an employee to be eligible for $7,654.00 per year. MOTION by Wieland, seconded by Hanson, to request the [Trial] Court [to] not implement the MERS B-4 upgrade at this time, but recognize the change in the 2001/2002 budget cycle.

Later that day, Judge Davis learned that the correct figure for the annual retiree payment was over $5,000, and immediately informed the Crawford Board of Commissioners of his error.[4]

Following this meeting, the Trial Court created a comprehensive contract outlining the retiree benefits package to serve as an informative guide for the Trial Court and its employees. The contract also included the promised memorialization of the "failsafe" provision. Kalkaska and Otsego counties immediately signed the contract, but Crawford County refused. The Crawford Board of Commissioners consulted with its auditor and labor counsel after approving the retiree benefits package and was advised that its approval was unwise. Crawford County was in the

middle of a budget crisis and was forced to cut many county services. As a result, the Board claimed that it had not approved the pension plan and was induced to approve the retiree healthcare plan by the Trial Court's misrepresentation of cost. This led to Crawford County's refusal in FY 2001, 2002, and 2003, to appropriate the full amount of their 24% of the Trial Court's requested operating budget.[5] Although Kalkaska County initially approved of the retiree benefits package and fully funded the Trial Court, it soon followed suit by rescinding its earlier resolutions and cutting appropriations.

Following lengthy negotiation with its funding units, the Trial Court filed suit against the Counties, seeking the enforcement of the contract to implement the retiree benefits package and adequate funding based on the constitutional theory of inherent powers. The Counties filed a counterclaim for declaratory judgment regarding their duty to fund the Trial Court and defended against the contract claims based on fraud. Otsego County was brought into the litigation by the Counties, who also filed a separate suit against it. The Counties asserted that Otsego County, as the Trial Court's control unit, had violated the Uniform Budgeting and Accounting Act (UBAA)[6] by disbursing funds to the Trial Court in excess of appropriations. The Counties also raised a fraud claim against Otsego. The Counties' fraud defense and all claims against Otsego County were dismissed before a trial on the merits began. Following a six-day trial in the summer of 2003, the lower court ruled in favor of the Trial Court on both its contract and constitutional theories in pursuit of funding.[7]

4 This incorrect figure was never presented to Kalkaska County.

5 Crawford County only fully funded the Trial Court in FY

2004, in exchange for the Trial Court's voluntarily dismissal of an additional funding claim for that year. Crawford County has fully funded the Trial Court in FY 2005.

6 MCL141.421 *et seq.*

7 Further facts necessary to this appeal will be discussed throughout this opinion where

(continued...)

[*6] II. Contract Claims

The lower court determined that the resolutions passed by the funding units created an explicit contract with the Trial Court to implement the retiree benefits package. Even if the parties had not formed a contract, the lower court determined that one could be implied. On appeal, the Counties contend that the lower court improperly interpreted the Crawford Board's resolution regarding the retiree healthcare plan as a valid acceptance, rather than a counteroffer. The Counties also contend that the Crawford Board's resolution regarding the pension plan was not an approval of the plan, but showed the Board's intent to table all discussion until the following year. We disagree.

The lower court correctly determined that Crawford County approved the retiree benefits package and formed a valid contract with the Trial Court for its implementation. Issues of contract interpretation are questions of law that we review de novo.[8] Issues regarding the formation of a valid contract are all questions of fact,[9] which we review for clear error.[10] The interpretation of a county resolution, like the interpretation of a statute, is a question of law, which we review de novo.[11]

We reject the Counties' contention that the resolutions passed by the Crawford County Board of Commissioners did not amount to a valid acceptance of an offer to implement the retiree benefits package. "'Decisions regarding the legitimacy of an offer and acceptance revolve around the particular facts pertaining to a specific transaction. . . .'"[12] "'[A]n acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose.'"[13] The acceptance must be unambiguous and strictly conform to the essential terms of the offer.[14] The Trial Court correctly asserts that the essential term of the offer to implement the retiree healthcare plan is the required annual appropriation, which would be (...continued)appropriate.

8 *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

9 See *In re Costs & Attorney Fees*, 250 Mich App 89, 97; 645 NW2d 697 (2002) (*Costs I*) (regarding whether a legitimate offer has been made and accepted forming a valid contract); *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 87-88; 492 NW2d 460 (1992) (regarding whether there was consideration for a contract).

10 MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

11 *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

12 *Costs I, supra* at 97, quoting *Patrick v US Tangible Investment Corp*, 234 Mich App 541, 549; 595 NW2d 162 (1999).

13 *Id.*, quoting *Kraus v Gerrish Twp*, 205 Mich App 25, 45; 517 NW2d 756 (1994).

14 *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997); *Giannetti v Cornillie*, 204 Mich App 234, 237; 514 NW2d 221 (1994), rev'd on other grounds 447 Mich 998; 525 NW2d 459 (1994) (only a material departure from the terms of the offer invalidates an acceptance).

[*7] 24% of $50,000 for Crawford County. The Crawford County Board of Commissioners clearly agreed to this term in the resolution. The annual payment cap was not an essential term. The change in amount did not affect the overall appropriation of the funding units. Therefore, this error was not a material deviation from an essential term and Crawford County's resolution was a valid acceptance. Furthermore, the initial error in the representation of this figure did not negate the mutual assent of the parties. Fraud in the inducement is a defense to the formation of a contract. However, the claimant must prove that it actually relied upon a material misrepresentation.[15] The alleged "misrepresentation" was not material. Additionally, as will be discussed in great detail later, the lower court properly dismissed the Counties' fraud defense before trial due to a lack of actual reliance.

We also disagree with the Counties' contention that the second Crawford County resolution did not approve of the pension plan. The only evidence supporting the Counties' claim is a series of affidavits by the individual commissioners stating their actual intent in passing the resolution. A county board speaks only through its official minutes and resolutions and their import may not be altered or supplemented by parol evidence regarding the intention of the individual members.[16] The clear language of the second resolution shows the Board's intent to approve of the plan, but delay

its implementation until the following cycle.

We also reject the Counties' contention that Crawford County's failure to sign the written contract outlining the retiree benefits package vitiated the existence of a contract. The official minutes and resolutions of the August 29, 2000 meeting memorialize the agreement of the parties. They officially voted to approve the retiree benefits package and the Trial Court relied on those resolutions to the detriment of its employees. While Judge Davis created a formal written contract regarding the retiree benefits package, Crawford County's signature on this extraneous writing was not required as evidence of the agreement.[17]

The Counties also argue that any continued duty to perform under the contract ended when they passed resolutions rescinding their prior approval of the retiree benefits package. However, a party to a contract may not unilaterally modify or waive a contract.[18] Finally, we

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15 *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

16 *Tavener v Elk Rapids Rural Agricultural Sch Dist*, 341 Mich 244, 251; 67 NW2d 136 (1954), quoting *Stevenson v Bay City*, 26 Mich 44, 45 (1872).

17 We reject the dissent's assertion that the contract between the Counties and the Trial Court to implement the retiree benefits package lacked consideration as counties have a preexisting statutory duty to fund the courts. The Trial Court's employees supplied the consideration for this contract by giving up rights to which they were otherwise entitled in order to secure the Counties' agreement to the benefits package.

18 *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372-373; 666 NW2d 251 (2003); *H J Tucker Assocs, Inc v*

[*8] reject the Counties' contention that the contract was invalid because its term exceeded the term of the current Board. There are many administrative functions that must be handled on a day-to-day basis that may require contracts lasting longer than the normal term of office.[19] If a successor board had the power to repudiate these types of contracts at will, a government entity's ability to do business would be compromised.[20] Accordingly, the lower court properly determined that the Trial Court had formed a valid contract with its funding units to implement the retiree benefits package.

III. Right to Seek Adequate Funding Based on Inherent Powers

The lower court also determined that the Trial Court had the inherent power to file suit seeking adequate funding from the Counties. Whether the Trial Court has the inherent power to compel the Counties to fund its retiree benefits package is a constitutional question, which we review de novo.[21] In discussing a court's inherent power to seek adequate funding, this Court reasoned as follows in the previous appeal:

The principles the lower court relied on in this regard have been accepted in Michigan for at least the last thirty-five years. In *Wayne Circuit Judges v Wayne Co*, 383 Mich 10, 33; 172 NW2d 436 (1969) (*Wayne I*), Justice Black, with Justice Dethmers concurring, noted the "unanimous" authority that a court charged with the responsibility for judicial service "receives and accepts with that responsibility

the inherent power and duty to take such action as is reasonably necessary to fulfil the constitutional obligation thus undertaken." On rehearing two years later, the Supreme Court adopted the Black-Dethmers opinion as the opinion of the Court, noting that it had been "authenticated" by decisions handed down by the supreme courts of Missouri and Pennsylvania:

> In view of the developing strength of the principle of inherent power and duty of the judiciary, called into play as it was by the opinion of Justices Dethmers and Black aforesaid, this Court is constrained on rehearing to adopt that opinion; adding only that the judiciary . . . must stand foursquare in support of the constitutional doctrines which, most recently in the

19 See *Harbor Land Co v Grosse Ile*, 22 Mich App 192; 177 NW2d 176 (1970) (finding that a township board had the power to enter into a long-term contract for the construction and operation of a waste treatment plant).

20 As we affirm the lower court's determination that an express contract existed to implement the retiree benefits package, we need not reach the lower court's alternate determination that an implied contract existed. However, we note that, if necessary, a contract could be implied under the circumstances to prevent the Counties' unjust enrichment as the Trial Court's employee concessions had already been implemented. See *Martin v East Lansing Sch Dist*, 193 Mich App 166, 177; 483 NW2d 656.

21 *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

[*9] [*Commonwealth v Tate*, 442 Pa 45; 274 A2d 193 (1971)] case, were declared. "Must" we have accented, just as the *Tate* Court stressed "must possess" in this terse and pointed summary of constitutional necessity . . . :

> "Expressed in other words, the Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government. This principle has long been recognized not only in this Commonwealth but also throughout our Nation." [*Wayne Circuit Judges v Wayne Co*, 386 Mich 1, 8-9; 190 NW2d 228(1971) (*Wayne II*), quoting *Tate, supra* at 52.]

A more recent and oft-cited discussion of the inherent power doctrine is found in *Employees & Judge of the Second Judicial Dist Court v Hillsdale Co*, 423 Mich 705; 378 NW2d 744 (1985) [hereinafter *Hillsdale].* The opinion of the majority agreed with the dissenting justices that "an inherent power analysis is implicated when judicial functions are in jeopardy" and reiterated that the "Court has stood 'foursquare' in support of the constitutional doctrine of inherent power" while concluding that the doctrine was not implicated under the facts of the case at hand. *Id.* at 724.
In a dissent concurred in by two other justices, Justice Riley noted that, "'irrespective of specific grant by constitution or legislation,'" the inherent power doctrine supplies "'authority to incur and order paid all such expenses as are reasonably necessary for the holding of court and the administration of the duties of courts of justice.'" *Id.* at 734 (Riley, J., dissenting), quoting 20 Am Jur 2d, Courts, § 78, p 440, and 59 ALR3d, § 2, p 574. Justice Riley explained that [t]his inherent authority of the court is nonajudicatory. It does not deal with justiciable matters. It only relates to the administration of the business of the court.

One aspect of the administration of district and circuit courts is the determination of the operational needs of the court and the establishment of a budget to provide for these needs. [*Hillsdale, supra* at 734-73 5.]

It is clear from these and other precedents, see, e.g., *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 299-300; 586 NW2d 894 (1998); *Livingston Co v Livingston Circuit Judge*, 393 Mich 265, 273; 225 NW2d 352 (1975); *Ottawa Co Controller v Ottawa Probate Judge*, 156 Mich App 594, 602-603; 401 NW2d [*10] 869 (1986); [*17th Dist Probate Ct v Gladwin Co Bd of Comm 'rs*, 155 Mich App 433, 45 1-452; 401 NW2d 50 (1986)], that a court has inherent power to take whatever steps are reasonably necessary to fulfill the judicial function.[22]

In taking those steps reasonably necessary to fulfill the judicial function, a court must remember that "'each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.'"[23] A court has the inherent power to seek "financing that is reasonable and necessary."[24] When a court files suit seeking adequate funding, it must show that the funding unit has failed to appropriate funds to allow the court to function "servicably as a co-equal branch of Michigan's government."[25] This Court defined "serviceability" as follows:

Serviceability must be defined in the context of Justice Black's opinion, *i.e.* "urgent", "extreme", "critical", and "vital" needs. A serviceable level of funding is the minimum budgetary appropriation at which statutorily mandated functions can be fulfilled. A serviceable level is not met when the failure to fund eliminates the function or creates an emergency immediately threatening the existence of the function. A serviceable level is not the optimal level. A

function funded at a serviceable level will be carried out in a barely adequate manner, but it will be carried out. A function funded below a serviceable level, however, will not be fulfilled as required by statute.[26]

The lower court's determination that the Trial Court's requested budget, specifically the requested appropriation for the retiree benefits package, was reasonable and necessary represents a factual finding that we review for clear error.[27] The lower court found that the Trial Court had reduced its staff to the "bare bones" and would be unable to function at a serviceable level if required to make more cuts. The lower court further found that funding the requested benefits was indispensable to serviceability. Many employees had taken on extra duties and all employees had accepted concessions to their detriment. Continuing to operate without the bargained-for retirement benefits package would cause morale to plummet and competent

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22 *46th Circuit Trial Court, supra* at 488-490.

23 *Employees & Judges of the 2d Judicial Dist Ct v Hillsdale Co*, 423 Mich 705, 717; 378 NW2d 744 (1985) (*Hillsdale*), quoting *United States v Will*, 449 US 200, 208; 101 S Ct 471; 66 L Ed 2d 392 (1980).

24 *17th Dist Probate Ct v Gladwin Co Bd of Comm 'rs*, 155 Mich App 433, 454-455; 401 NW2d 50 (1986) (*Gladwin*), citing *Livingston Co v Livingston Circuit Judge*, 393 Mich 265; 225 NW2d 352 (1975), and *Hillsdale, supra*.

25 *Wayne Circuit Judges v Wayne Co*, 383 Mich 10, 33; 172 NW2d 436 (1969) (*Wayne I*).

26 *Wayne Co Prosecutor v Wayne Co Bd of Comm 'rs*, 93 Mich App 114, 123-124; 286 NW2d 62 (1979). See also *Wayne Co Sheriff v Wayne Co Bd of Comm 'rs*, 148 Mich App 702, 708; 385 NW2d

267 (1983).

27 MCR 2.613(C); *Alan Custom Homes, supra* at 512. See also *Gladwin, supra* at 456-457.

[*11] employees to take alternate employment, leading to a decrease in productivity. These findings were based on the record evidence and were not clearly erroneous.

The Counties' contention that the Trial Court's budget request was excessive and unreasonable in light of the state of the Counties' budgets is without merit. Although the Counties assert that they were financially unable to fund the Trial Court at the requested level, they have not demonstrated that the requested funds were necessary to fund other "obligations having the same rank and priority."[28] Second, the Trial Court presented evidence that certain employees in each of the funding units received identical pension benefits.[29] Third, the Trial Court was not required to select a retiree benefits package consistent with that provided by any of the three funding units. AO 1998-5 provides that a court with multiple funding units may implement "a single, uniform personnel policy that does not wholly conform with specific personnel polices of any of the court's funding units."[30] Finally, we note that the lower court's factual determination that the retiree benefits package was a reasonable and necessary expense to the continued serviceability of the Trial Court is consistent with longstanding precedent finding similar court expenses to be within reason.[31] Accordingly, the lower court did not commit clear error by determining that the requested appropriation to fund the retiree benefits package was reasonable and necessary to the continued serviceability of the Trial Court.

IV. Award of Attorney Fees to the Trial Court Based on Inherent Powers

A. Entitlement to Attorney Fees

Early in the litigation, the lower court determined that the Trial Court was entitled to recover its attorney fees expended in seeking adequate funding. The funding units were each required to provide one-third of these fees. As a court has the inherent power to seek adequate funding, it must also have the inherent power to seek attorney fees in order to bring such litigation. These attorney fees are based on the constitutional power of a court, not a party's success on the merits. Furthermore, as the policy of this state is to assess interest on awards of

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28 *Wayne Co Prosecutor, supra* at 128; *Wayne Circuit Judges v Wayne Co*, 15 Mich App 713, 728-729; 167 NW2d 337 (1969), rev'd in part on other grounds *Wayne I, supra*.

29 See AO 1998-5 § II. See also *Livingston, supra* at 288 ("In determining the amounts to be appropriated for judicial needs, a board of commissioners necessarily considers other county needs and the wage levels of other employees paid with county funds.").

30 AO 1998-5 § VI.

31 See *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 297; 586 NW2d 894 (1998), vacated in part on other grounds 460 Mich 590; 597 NW2d 113 (1999); *Branch Co Bd of Comm'rs v Service Employees Internat'l Union, Local 586*, 168 Mich App 340, 349; 423 NW2d 658 (1988); *Ottawa Co Controller v Ottawa Probate Judge*, 156 Mich App 594; 401 NW2d 869 (1986) (finding that a court has the power to set expenses, such as employee wages, within the funding unit's overall appropriations to the court). See also *Cameron v Monroe Co Probate Ct*, 457 Mich 423, 427-428; 579 NW2d 859 (1998)

(finding that "the supervision and administration of court personnel is a necessary expense of justice for which the county is expected to pay").

[*12] attorney fees and costs, the lower court properly determined to assess interest at the statutory rate. The Trial Court was entitled to the fees incurred in litigating all its claims, as the contract claims were part and parcel of the inherent powers funding litigation. The lower court also determined that the Trial Court was entitled to attorney fees under MCL 49.73, which requires a county to secure and fund outside counsel for a county official, including a judge, who is named as a defendant, based on the Counties' counterclaims.

The Counties filed an interlocutory appeal of the lower court's order. In the prior published opinion, this Court affirmed the lower court's order. However, this Court found that MCL 49.73 was inapplicable under the circumstances as the Trial Court had instituted this action.[32] Furthermore, this Court determined that the amount of attorney fees that a court may recover in funding litigation must be limited. Therefore, a court may only recover attorney fees at an hourly rate that was 150% of that charged by its funding unit's counsel, and only 150% of the total fees expended by the funding unit.[33]

The Counties continue to challenge the lower court's order and now contend that the previous published opinion of this Court was erroneous as well. Even if we were to agree with the Counties' challenges, we would be unable to provide any relief. We are bound by the previous published opinion of this Court.[34] We are further bound by the law of the case doctrine.

The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case.[35]

Accordingly, we decline to review the Counties' claimed errors.

B. Relieving Otsego County of its Duty to Pay the Trial Court's Attorney Fees

The Counties also challenge the lower court's order relieving Otsego County of its responsibility to fund the Trial Court's attorney fees and reapportioning its duty among the other two counties. Although Otsego County sought to be indemnified by the Counties for its share of the attorney fees, the lower court instead determined that it was entitled to relief based on equitable principles. In doing so, the lower court rejected the Counties' attempt to reapportion

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32 *46th Circuit Trial Court, supra* at 486-488.

33 *Id.* at 500-591.

34 MCR 7.215(C)(2); *Catalina Marketing Sales Corp v Dep 't of Treasury*, 470 Mich 12, 23; 678 NW2d 619 (2004). The fact that the Counties appealed this decision to the Michigan Supreme Court, which held the application in abeyance pending the resolution of these consolidated appeals, has no effect on the prior opinion's precedential value. MCR 7.215(C)(2); *Johnson v White*, 261 Mich App 332, 347; 682 NW2d 505 (2004).

35 *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001), citing *Driver v Hanley (After Remand)*, 226 Mich App

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[*13] the fees according to the Trial Court funding formula, under which Otsego County was responsible for the lion's share of the budget.

We review a lower court's decisions in equity de novo and all underlying findings of fact for clear error.[36] "Jurisdiction of the courts of equity is recognized where 'the facts involved in litigation are such that a claimed legal remedy, although available, will not afford adequate relief'"[37] Otsego County's indemnification claim sounded in tort as it was based on the Counties' "wrongdoing" in failing to fund the Trial Court and instigating this litigation. As the underlying suit is constitutional in nature, such indemnification would be precluded, denying Otsego County adequate relief. Otsego County was brought into this litigation with "clean hands"—it had continually funded the Trial Court at the requested level. Accordingly, it was entitled to the equitable relief granted by the lower court.[38]

Additionally, the lower court properly found that the Counties were not immune from Otsego County's motion to be relieved from its duty to pay the Trial Court's attorney fees. As noted previously, the Trial Court's right to collect attorney fees arose from its constitutional inherent powers. Those powers may not be abridged or restricted by statute, by allowing another governmental unit to be immune while violating that constitutional power.[39]

The Counties also challenged the propriety of the lower court's order as Otsego County failed to present the claim to the Counties' clerks pursuant to MCL 46.11(m). Although the lower court determined that the statute only requires the presentment of claims based on private wrongs,

nothing in the plain language of the statute supports that theory. However, it would have been futile for Otsego County to present its claim for relief to the Counties as the Counties continually fought the payment of the Trial Court's attorney fees and were seeking the reapportionment of those fees in their favor.[40]

C. Determining the Reasonableness of the Trial Court's Attorney Fees Without an Evidentiary Hearing

In the previous appeal, the Counties challenged the lower court's determination regarding the reasonableness of the Trial Court's requested attorney fees. This Court determined that the Counties forfeited the right to an evidentiary hearing by failing to request one. This Court also

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36 *Eller v Metro Industrial Contracting, Inc*, 261 Mich App 569, 571; 683 NW2d 242 (2004).
37 *Mooahesh v Dep 't of Treasury*, 195 Mich App 551, 561; 492 NW2d 246 (1992), quoting *Wild v Wild*, 360 Mich 270, 276-277; 103 NW2d 607 (1960).
38 *Rose v Nat'l Auction Group*, 466 Mich 453, 462-463; 646 NW2d 455 (2002).
39 *Persichini v William Beaumont Hosp*, 238 Mich App 626, 638-639; 607 NW2d 100 (1999). See also *Smith v Dep 't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987).
40 See *Manor House Apartments v City of Warren*, 204 Mich App 603, 606; 516 NW2d 530 (1994); *Miller Bros v Dep 't of Natural Resources*, 203 Mich App 674, 681; 513 NW2d 217 (1994) (finding that a party need not take futile actions).

[*14] determined that the Counties would not be entitled to a

hearing, even if one had been requested, because the parties presented a sufficient record from which the lower court could determine the reasonableness of counsel's hourly rates and the hours expended on the litigation.[41]

As the litigation continued, the lower court granted the Trial Court's continuing requests for attorney fees without evidentiary hearings, although requested by the Counties. We review a lower court's determination regarding the necessity of an evidentiary hearing regarding the reasonableness of requested attorney fees for an abuse of discretion.[42] As the Trial Court continually presented evidence of the same nature and quality, the lower court properly determined with each request that the record was sufficient for a review without an evidentiary hearing.

V. Fraud and Innocent Misrepresentation

In defense of the Trial Court's contract claims, the Counties asserted that Crawford County was induced to approve of the retiree healthcare plan, as Judge Davis misrepresented the actual costs of the plan. Specifically, the Counties claimed that Judge Davis represented that the annual payment per retiree would be over $1,000 less than the actual cost. The Counties also asserted that they were induced to approve of the pension plan upgrade without adequate cost information as the Trial Court and Otsego County misrepresented that they did not possess actuarial valuations regarding this plan.

All of these claims were dismissed prior to trial, as they lacked factual support. A letter written by Crawford County Controller, Paul Compo, to the Counties' counsel, Mr. Cohl, on December 17, 2001, became public during discovery. In this letter, Mr. Compo admitted that the Crawford County Board of Commissioners was aware of the correct

annual payment figure before passing the resolution approving the plan and included the incorrect figure in the resolution to cause a reaction.[43] Based on this letter, the lower court dismissed the Counties'

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41 *46th Circuit Trial Court, supra* at 502-504.

42 *Id.* at 502.

43 The letter states in relevant part:

[Implementation Order 2000-11] states that each of the funding units had passed resolutions approving the shift in benefits. This is not entirely true. Crawford passed a motion to approve the caps in retirement health care insurance, knowing the numbers were wrong as a way to "call the [Trial Court's] bluff."

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The [Trial Court] also included a copy of the minutes for the Special Board Meeting of August 29th, 2000. During this meeting [sic] the Board agreed to fund the retirement health care as proposed for 17 years. They did not agree to the terms and conditions outlined in the proposed contract. They agreed to this

(continued...)

[*15] fraud defense against the Trial Court and imposed sanctions upon the Counties and their counsel for filing a frivolous defense. The lower court also dismissed the Counties' claim that the Trial Court misrepresented actuarial valuations regarding the pension upgrade. The Counties learned by records received through a FOIA request before this litigation commenced that the Trial Court did not possess any relevant actuarial valuations. None of the valuations

analyzed the proposed pension plan and each contained a disclaimer that it was inapplicable to other levels of benefits. The lower court declined to sanction the Counties for raising the defense on this ground.

Before trial, the Counties voluntarily dismissed their fraud claim against Otsego County. In 2001, Otsego County passed a resolution approving the pension plan. This resolution indicated that the approval was based on an actuarial valuation prepared in January of 2001. During discovery, Otsego County admitted that it never possessed the cited valuation and based its resolution approving of the pension plan on form language provided by MERS. The lower court sanctioned the Counties and their counsel for raising this claim as the Counties could not allege that they relied on a resolution and actuarial valuation dated *after* their own resolutions approving the pension plan.

The Counties now challenge the lower court's dismissal of their fraud claims against the Trial Court pursuant to MCR 2.1 16(C)(10).[44] We review a lower court's determination regarding a motion for summary disposition de novo.[45] A motion under MCR 2.1 16(C)(10) tests the factual support of a party's claim.[46] "In reviewing a motion for summary disposition brought under MCR 2.1 16(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[47] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[48]

The elements of fraudulent misrepresentation are (1) the [declarant] made a material misrepresentation, (2) the representation was false, (3) when making the representation, the [declarant] knew or should have known it

was false, (4) the [declarant] made the representation with the intention that the [induced party] would act upon it, and (5) the [induced party] acted upon it and suffered damages

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(...continued)
because they believed the information provided on this issue by the [Trial Court] was erroneous and would cause the [Trial Court] to react.
44 The lower court actually granted the Trial Court's motion to strike the Counties' fraud defense. However, the lower court based its decision on the lack of factual support for the claims. Accordingly, we will review the lower court's decision as a motion for summary disposition pursuant to MCR 2.1 16(C)(10).
45 *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).
46 *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).
47 *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). 48 *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

[*16] as a result. A claim of innocent misrepresentation is shown if a party to a contract detrimentally relies on a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. [49]

The letter from Mr. Compo clearly indicates that the Board knew of the error and purposely included the figure in its resolution. Furthermore, several commissioners admitted at their depositions that they knew of the error or believed the figure was incorrect. Accordingly, the lower court properly dismissed this defense. Furthermore, as the

Trial Court actually did not possess any relevant actuarial valuations to disclose to the Counties, the lower court properly dismissed that defense as well.

However, the Counties also challenge the use of Mr. Compo's letter by the opposing parties and the lower court. The Counties assert that the letter was protected by the attorney-client privilege and, therefore, any injustice caused as a result of its use must be remedied. The Trial Court and Otsego County do not dispute that the letter would be protected by the attorney-client privilege;[50] however, they assert that the Counties waived their right to assert that privilege. Whether a party has waived the attorney-client privilege is a question of law, which we review de novo.[51]

The Trial Court and Otsego County first relied upon the letter during Mr. Compo's deposition. The Counties objected to its use at that time; however, neither party could determine how the letter was disclosed. Although the Counties contend that opposing counsel received this letter by improper means, the Counties concede for purposes of this appeal that the letter was disclosed to the opposing parties inadvertently during discovery. Following Mr. Compo's deposition, the Trial Court and Otsego County continually relied on the letter in seeking the dismissal of the Counties' fraud claims and in seeking sanctions for these frivolous claims. However, the Counties failed to reassert their objection to the use of the letter based on the attorney-client privilege until five months after the last fraud claim had been dismissed and three months after the lower court had entered its final judgment on the merits. The attorney-client privilege is personal and may only be waived by the client.[52] The client's waiver of that privilege cannot be predicated upon an inadvertent disclosure; it must be "'an intentional, voluntary act and cannot rise by implication.'"[53]

While the inadvertent disclosure of the letter did not waive the Counties' right to assert the privilege, the Counties' failure to object over a *prolonged* period of time is a voluntary and intentional act evincing the Counties waiver of that

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49 *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).

50 As neither party disputes that the letter would be protected by the privilege, we will assume for purposes of this appeal that the privilege applies.

51 *Leibel v General Motors Corp*, 250 Mich App 229, 240; 646 NW2d 179 (2002).

52 *Paschke v Retool Indus*, 445 Mich 502, 518 n 15; 519 NW2d 441 (1994), quoting *In re Passmore Estate*, 50 Mich 626, 627; 16 NW 170 (1883); *Leibel, supra* at 240.

53 *Sterling v Keidan*, 162 Mich App 88, 91; 412 NW2d 255 (1987).

[*17] privilege. Granting the Counties relief now, after their extended acquiescence to the use of the letter throughout this litigation, would result in a waste of judicial time and resources. Accordingly, we affirm all actions taken as a result of the use of this letter.

VI. Standing Under the UBAA

Prior to trial, the lower court *sua sponte* questioned the Counties' standing to raise claims against Otsego County based on the UBAA. After giving the parties an opportunity to brief the issue, which the Counties neglected to do, the lower court found that the UBAA clearly provides that only the Attorney General and prosecuting attorney have

standing to institute a civil action for a violation of the act.[54] Therefore, the lower court dismissed the Counties' claims to the extent they were based on the UBAA.[55] The lower court also sanctioned the Counties' counsel for filing these claims when the lack of standing was self-evident.

Whether a party has standing is a question of law that we review de novo.[56] Generally, to have standing, "a party must have a legally protected interest that is in jeopardy of being adversely affected."[57] A party raising a claim must have "'some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.'" However, the Counties' claims are governed by statute. This Court has already held that, according to the plain language of that statute, the only parties with standing to bring an action under the UBAA are the Attorney General and prosecuting attorney.[58] Accordingly, the lower court properly dismissed the Counties' claims against Otsego County for lack of standing. We also reject the Counties' contention that the lower court should not have raised the issue of standing. The Counties contend that the Trial Court waived its right to raise this defense by failing to include the defense as a motion for summary disposition under MCR 2.11 6(C)(5) in its first responsive pleading pursuant to MCR 2.11 6(D)(2). However, this Court has determined that a standing defense need not be raised under MCR 2.1 16(C)(5); it could also be raised under MCR 2.11 6(C)(8), which can be raised at any time.[59] Furthermore, we see no need to prohibit a lower court from considering an issue of its own accord, especially where that consideration will prevent further error for our review.[60]

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54 MCL 141.440.

55 The Counties voluntarily dismissed these claims in their

entirety on the first day of trial when they could find no other grounds upon which to base their claims.

56 *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004).

57 *In re Foster*, 226 Mich App 348, 358; 573 NW2d 324 (1997).

58 *Rayford v Detroit*, 132 Mich App 248; 347 NW2d 210 (1984).

59 See *Kaiser v Schreiber*, 258 Mich App 357, 369-371; 670 NW2d 697 (2003), rev'd on other grounds 469 Mich 944; 670 NW2d 671 (2003). See also MCR 2.1 16(D)(3).

60 See *LME v ARS*, 261 Mich App 273, 287; 680 NW2d 902 (2004); *Paschke v Retool Indus (On Rehearing)*, 198 Mich App 702, 706; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich

(continued...)

[*18] VII. Sanctions for Frivolous Claims and Defenses

The Counties and their counsel challenge the imposition of sanctions for filing a frivolous fraud defense against the Trial Court and for filing a frivolous fraud claim and claims predicated upon the UBAA against Otsego County. We review a lower court's determination that a claim or defense is frivolous for clear error. A determination is clearly erroneous when, although there is sufficient evidence to support it, we are left with a definite and firm conviction that a mistake has been made.[61] Pursuant to MCR 2.114(D), an attorney or party that signs a pleading certifies that "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law[.]"[62] Sanctions may be imposed on the attorney, client or both for a violation of this rule. These

sanctions "may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the document, including reasonable attorney fees."[63] A party raising a frivolous claim or defense is also subject to costs pursuant to MCR 2.625(A)(2) and MCL 600.2591[64] as follows:

> 1. Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by asserting the costs and fees against the nonprevailing party and their attorney
> 2. The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> ***
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(...continued)502; 519 NW2d 441 (1994).

61 *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002); *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999).

62 MCR 2.1 14(D)(2).

63 MCR 2.1 14(D)(3).

64 MCR 2.625(A)(2) directs that costs may be charged pursuant to the statute.

[*19] (iii) The party's legal position was devoid of arguable legal merit.[65]

As noted previously, the lower court properly determined that Crawford County had actual knowledge that the annual payment cap represented by Judge Davis was incorrect at the time the resolution was passed. Their counsel learned of this fact one year before the lawsuit was initiated. Accordingly, the lower court properly determined that the Counties' fraud defense against the Trial Court was frivolous at the time it was filed and, therefore, imposed sanctions against both the Counties and their counsel.[66]

Also as noted above, it is clear from the plain language of the UBAA and binding precedent of this Court that the only parties with standing to raise a claim under that statute are the Attorney General and prosecuting attorney. This authority was available long before counsel filed these claims in this litigation. As these were statutory claims, counsel could have no argument that standing was conferred on any other ground. Accordingly, the lower court also properly imposed sanctions against counsel for filing the UBAA claims against Otsego County.

The Counties and their counsel also challenge the lower court's imposition of sanctions without first holding

an evidentiary hearing. As noted above, the Trial Court presented a sufficient record from which the lower court could determine the reasonableness of its fees without an evidentiary hearing. Otsego County presented an identically sufficient record, including detailed billing statements and affidavits of counsel.[67] Therefore, no evidentiary hearing was required to determine the reasonableness of the fees imposed as sanctions. However, the Counties also challenge the lower court's determinations regarding the percentage of counsel's time used in defending the claims for which sanctions were imposed. Judge Kolenda presided over the entire proceeding and was aware of the amount of time spent litigating the issues in court. Furthermore, he equitably divided the fees amongst each claim raised in the lawsuits. Under the circumstances, this formula was a reasonable approximation of the time actually expended and we find no abuse of discretion.[68]

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65 MCL 600.2591.

66 The dissent argues that these sanctions are duplicative as the Counties were already required to pay the Trial Court's attorney fees and costs and, therefore, were unnecessarily punitive and a waste of taxpayer dollars. However, neither the court rule nor the statute makes a distinction between attorneys for private, versus public, clients. A careful review of the record in this case would indicate that both the proceedings before the lower court and this Court were entirely frivolous. These sanctions are designed to reimburse counsel for excess work necessitated by such meritless claims and were properly imposed.

67 The Counties do not contest the reasonableness of the hourly rates of Otsego County's counsel.

68 See *Costs I, supra* at 104-106.

[*20] VIII. Disinterested Judge

The Counties contend that SCAO improperly assigned an interested judge in violation of AO 1998-5. The order requires the assignment of a disinterested judge to hear a case involving a funding dispute between a court and its funding unit. The Counties failed to move for Judge Kolenda's disqualification in the lower court. Whatever their articulated reason for failing to do so, it is fatal to their claim. Accordingly, the Counties waived appellate review of their challenge to the judicial assignment by failing to raise an objection below.[69]

IX. Motion for Guidance

Shortly before we were scheduled to hear oral argument in this case, the Counties filed a motion for guidance asserting that the Trial Court ceased to exist on August 1, 2004, with the passage of AO 2004-2. With that order, the Michigan Supreme Court ended the demonstration project status of the 46th Circuit Trial Court. The Supreme Court also adopted the concurrent jurisdiction plan proposed by the Trial Court. However, a review of the concurrent jurisdiction plan clearly reveals that the Trial Court intends to continue to function as a unified trial court system. Accordingly, we reject the Counties' frivolous contention that the entire litigation must be dismissed.

Affirmed.
/s/ Jessica R. Cooper /s/ Janet T. Neff

69 See MCR 2.003(C)(1), (3).

[*21] **STATE OF MICHIGAN**
COURT OF APPEALS

46TH CIRCUIT TRIAL COURT,

Plaintiff/Counter-Defendant/ThirdParty-Plaintiff-Appellee,

v

COUNTY OF CRAWFORD and CRAWFORD COUNTY BOARD OF COMMISSIONERS,

Defendants/Counter-Plaintiffs/Third-Party-Plaintiffs-Appellants,

COUNTY OF KALKASKA,

Third-Party-Plaintiff/CounterDefendant-Appellant,

and

COUNTY OF OTSEGO,

Third-Party-Defendant-Appellee.

FOR PUBLICATION
May 3, 2005
9:05 a.m.

No. 254179
Crawford Circuit Court
LC No. 02-005951-CZ

COUNTY OF CRAWFORD and COUNTY OF KALKASKA,

Plaintiffs-Appellants,

v

COUNTY OF OTSEGO,

Defendant-Appellee.

No. 254180
Otsego Circuit Court
LC No. 02-010014-CZ

[*22] 46TH CIRCUIT TRIAL COURT,
Plaintiff/Counter-Defendant/Third
Party-Paintiff-Appellee,

v

No. 254181
Crawford Circuit Court
L.C. No. 02-011004-CZ

COUNTY OF CRAWFORD and CRAWFORD
COUNTY BOARD OF COMMISSIONERS,
Defendants/CounterPlaintiffs/
Third-Party-Plaintiffs,

COUNTY OF KALKASKA,
Third-Party-Plaintiff/CounterDefendant,

COUNTY OF OTSEGO,
Third-Party-Defendant-Appellee,

and

COHL STOKER TOSKEY & MCGLINCHEY PC,
Appellant.

COUNTY OF CRAWFORD and COUNTY OF KALKASKA,
Plaintiffs,

v

No. 254182
Otsego Circuit Court
LC No. 02-010014-CZ

COUNTY OF OTSEGO,
Defendant-Appellee,

And

COHL STOKER TOSKEY & MCGLINCHEY PC,
Appellant.

Michigan Court of Appeals opinion 5/3/05 APPENDIX E
Before: Zahra, P.J., and Neff and Cooper, JJ.

ZAHRA, J. (*concurring in part and dissenting in part).*

I concur with the results reached in sections III, IV, V, VI, VIII, and IX of the majority opinion. I respectfully dissent from sections II (addressing contract claims) and VII (addressing the imposition of sanctions) of the majority opinion. In short, I disagree with the majority's conclusion that a valid contract existed between the Counties and the Trial Court. The Counties were under a preexisting duty to appropriate reasonable funds necessary for the Trial Court to carry out its constitutionally mandated duties. Thus, the promise to fund the Trial Court cannot constitute adequate consideration to support a contract. I further conclude that the imposition of sanctions on the Counties served no purpose except to punish the Counties. The sanctions mandated under MCL 600.2591 and MCR 2.625(A)(2) are intended only to compensate litigants for attorney fees and costs expended in answering frivolous claims and defenses.

These [*24] sanctions should not be punitive. Here, the Counties were already paying the Trial Court's reasonable attorney fees and costs. Therefore, the Trial Court did not incur expenses as a result of the Counties' pursuit of allegedly frivolous claims and defenses.[1] Thus, the award of attorney fees as a sanction was not warranted. I would reverse that portion of the lower court's judgment that found the Counties in breach of contract. I would also vacate the award of attorney fees and costs as a sanction for pursuit of frivolous claims and defenses. In all other respects, I would affirm the judgment of the lower court.

I. Contract Claims

The majority concludes in section II of its opinion that the Counties breached an express contract with the Trial Court to implement an improved employee retirement plan. I dissent from this decision because the Counties could not enter into a contract with the Trial Court to fund something they had a preexisting duty to fund under statute and the Michigan Constitution.

The duty of the counties to fund the circuit courts is defined by statute. MCL 600.59 1(1) requires the county board of commissioners in each county to annually appropriate funds for the operation of the circuit court in that county. Administrative Order No. 1998-5 sets forth the details of court budgeting.[2] Not only do counties have this statutory duty to fund circuit courts, but the judiciary possesses the inherent constitutional power to compel the counties to pay those sums of money that are reasonable and necessary to carry out the courts' mandated responsibilities. *46th Circuit Trial Court v Crawford Co,* 261 Mich App 477, 489; 682 NW2d 519 (2004), citing *Wayne Circuit Judges v Wayne Co,* 386 Mich 1, 8-9; 190 NW2d 228 (1971) (*Wayne II).* This includes the power to fix the salaries of its employees within the budget appropriations. *Employees and Judge of the Second Judicial District Court v Hillsdale Co,* 423 Mich 705, 722; 378 NW2d 744 (1985); *Ottawa Co Controller v Ottawa Probate Judge,* 156 Mich App 594, 603-604; 401 NW2d 869 (1986). The judiciary also has the inherent authority to manage its employees in order to carry out its operations. *Judicial Attorneys Ass 'n v Michigan,* 459 Mich 291, 297; 586 NW2d 894 (1998), vacated in part on other grounds 460 Mich 590; 597

1 For purposes of addressing this issue, I shall assume without deciding that the claims and defenses pursued by the Counties were frivolous.

2 Administrative Order No. 1998-5, § II provides, in pertinent part:

A court must submit its proposed and appropriated annual budget and subsequent modifications to the State Court Administrator at the time of submission to or receipt from the local funding unit or units. The budget submitted must be in conformity with a uniform chart of accounts. If the local funding unit requests that a proposed budget be submitted in line-item detail, the chief judge must comply with the request. . . . A chief judge may not enter into a multiple-year commitment concerning any personnel economic issue unless: (1) the funding unit agrees, or (2) the agreement does not exceed the percentage increase or the duration of a multiple-year contract that the funding unit has negotiated for its employees. . . .

[*25] NW2d 113 (1999). "[T]he fundamental and ultimate responsibility for all aspects of court administration, including operations and personnel matters within the trial courts, resides within the inherent authority of the judicial branch." *Id.* at 299. A court may file a civil action to compel funding "[i]f, after the local funding unit has made its appropriations, a court concludes that the funds provided for its operations by its local funding unit are insufficient to enable the court to properly perform its duties and that legal action is necessary . . . ." Administrative Order No. 1998-5, § III.

Simply put, the Counties were obligated by statute

and constitution to provide the Trial Court funding adequate to fulfill its function. In fact, the Trial Court asserted its inherent power to order adequate and necessary funding under Administrative Order No. 1998-5. The lower court concluded that funding for the retirement plan was reasonable and necessary for the Trial Court to fulfill its statutorily mandated function. The majority has determined that there is sufficient evidence to support the lower court's finding.[3] "A pledge to undertake a preexisting statutory duty is not supported by adequate consideration." *Gen Aviation, Inc v Capital Region Airport Auth (On Remand)*, 224 Mich App 710, 715; 569 NW2d 883 (1997). Because the Counties had a preexisting duty to appropriate funds for the retirement plan, this duty could not provide adequate consideration for any alleged contractual relationship. *Alar v Mercy Mem Hosp*, 208 Mich App 518, 525; 529 NW2d 318 (1995). Further, the Trial Court could not offer the Counties anything in exchange for the Counties providing funding beyond that required by statute. The funding of the trial courts is not a bargained-for exchange subject to contract principles, but is a statutory obligation for the funding units and a constitutional right for the courts. Because the alleged contract between the Trial Court and the Counties lacked consideration, plaintiff's contract claims must fail.[4]

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3 The lower court's finding that funding for the retirement plan was reasonable and necessary for the Trial Court to function is reviewed for clear error. MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Clear error exists only where a reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* While I have concerns

whether the funding of a retirement plan can be necessary to the functioning of a court, I cannot conclude definitively that the lower court erred in making this finding, given the very unique circumstances surrounding the merger of courts under the demonstration project imposed upon the Counties.

4 Plaintiff alleged alternative counts of breach of contract and contract implied in law (quantum meruit), which he was entitled to do under MCR 2.11 1(A)(2). *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 573; 595 NW2d 176 (1999). Quantum meruit is an equitable principle. *In re McKim Estate*, 238 Mich App 453, 458; 606 NW2d 30 (1999)

"A contract implied in law is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended. A contract may be implied in law where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation. However, this fiction is not applicable where there exists a relationship between the parties that gives rise to the presumption

(continued...)

[*26] Additionally, neither the statutes governing appropriations for trial courts nor Administrative Order No. 1998-5 provide that trial courts and their funding units can enter contracts concerning court appropriations. Rather, Administrative Order No. 1998-5 speaks only of contracts between the courts and their employees. Because courts have the authority and responsibility for personnel matters, any contract regarding the salaries or benefits of court employees should be between the court and its employees,

not between the court and its funding unit.[5] The funding unit must appropriate sufficient funds to satisfy a contract between the court and its employees. If the funding unit considers an agreement between a local judiciary and its employees to be excessive because it appears that the budget reflecting the contract will exceed the total appropriation, the funding unit may file suit to test the reasonableness and necessity of the provisions contained in the agreement. *Livingston Co, supra* at 274; *Stanley v City of Ferndale,* 115 Mich App 703, 709; 321 NW2d 681 (1982). However, there is no legal authority supporting the pursuit of contract claims between courts and their funding units. Accordingly, I conclude that the contract claims lack legal merit.

II. Sanctions for Frivolous Claims and Defenses

The majority concludes in section VII of its opinion that the lower court properly sanctioned the Counties for raising frivolous fraud claims and defenses. I dissent because the sanction amounts to a duplicative award of attorney fees and costs to the Trial Court.

If a party raises a frivolous claim or defense, the court must award the prevailing party costs and fees incurred by that party in connection with the civil action. MCL 600.2591; MCR 2.625(A)(2). "The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by

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(...continued) that services were rendered gratuitously." [*Id.* at 457-45 8, quoting *In re Lewis Estate,* 168 Mich App 70, 74; 423 NW2d 600 (1988).]

In the present case, there can be no contract implied in law because the Counties did not receive any benefit from the Trial Court. The Counties were statutorily and constitutionally obligated to fund the retirement plan whether or not the Trial Court employees gave up employment benefits in exchange for implementation of the retirement plan.

5 In *Judicial Attorneys Ass 'n, supra* at 299 n 6, our Supreme Court noted:

> Over the years, some trial court judges have arrived at agreements under which the trial courts have allowed their funding units to negotiate on their behalf directly with court employees. In those jurisdictions, typically, the terms and conditions of the court employees vary little if at all from those of the funding unit employees. In contrast, in many jurisdictions the funding units have not desired to play any role concerning the terms and conditions of trial court employment. And in a few jurisdictions, from time to time, courts and their funding units have found themselves at loggerheads over employment issues. It is this category that our case law concerning separation of powers and court employment arises.

[*27] assuming that the Counties' fraud claims and defenses were frivolous, the lower court had the duty to award the Trial Court reasonable attorney fees and costs. *In re Attorney Fees and Costs*, 233 Mich App 694, 705; 593 NW2d 589 (1999).

As recognized by the majority in section IV of its opinion, this Court concluded in *Crawford Co, supra* at 490-491, that under the Trial Court's inherent powers, it was entitled to

recoup reasonable attorney fees and costs it incurred in litigating all of its claims. The majority in the present case holds that the Trial Court is also entitled to attorney fees and costs under MCL 600.2591 for raising frivolous claims and defenses, thus effectively giving the Trial Court a duplicate recovery of attorney fees and costs.

In *McAuley v General Motors Corp*, 457 Mich 513, 525; 578 NW2d 282 (1998), repudiated in part on other grounds by *Rafferty v Markovitz*, 461 Mich 265, 273 n 6; 602 NW2d 367 (1999), our Supreme Court held that the plaintiff was not entitled to recover duplicative attorney fees under the mediation rule because he already had been fully reimbursed for his reasonable attorney fees under statute. In so holding, the Court explained that only compensatory damages generally are available in Michigan, and that punitive sanctions may not be imposed. *Id.* at 519-520.[6] "Because the purpose of compensatory damages is to make the injured party whole for the losses actually suffered, the amount of recovery for such damages is inherently limited by the amount of loss; the party may not make a profit or obtain more than one recovery." *Id.* at 520. If a party has already been fully reimbursed for reasonable attorney fees and costs, there are no "actual costs" remaining to be reimbursed. *Id.* at 521. However, if a party has been awarded something less than a reasonable attorney fee and there are actual costs remaining, an additional award may be appropriate in some cases. *Id.*[7]

Here, the Trial Court was awarded reasonable attorney fees and costs under the inherent power doctrine. MCR 2.625(A)(2) and MCL 600.2591 also provide for an award of court costs and reasonable attorney fees. But there is no indication in MCR 2.625(A)(2) or MCL 600.2591 that a double recovery would be appropriate. Further, the

purposes of neither the statute, court rule, nor Michigan Constitution would be served by giving a court double recovery at the expense of its funding unit—a sum that would ultimately punish the taxpayers and result in the court recovering money that is not necessary for its functioning.

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6 As the Court observed, there are "statutory exceptions to this general rule that specifically provide for punitive damages, e.g., MCL 15.240(7) . . . , MCL 600.29 1 1(2)(b) . . . , MCL 750.53 9h(c) . . . ." *McAuley, supra* at 520 n 8.-

7 In *McAuley, supra* at 522, our Supreme Court stated in dicta that there are situations where independent policies and purposes may serve to allow a party double recovery. *Id.* at 522. But in *Rafferty v Markovitz*, 461 Mich 265 Mich 273 n 6; 602 NW2d 367 (1999), the Supreme Court repudiated "the dicta in *McAuley* that left open the possibility of recovering attorney fees under both a court rule and a statute where each attorney-fee provision serves an independent purpose."

[*28] Because the Trial Court was already reimbursed for reasonable attorney fees and costs, I conclude that it is not entitled to a double recovery of these costs. *McAuley, supra* at 522-524.

/s/ Brian K. Zahra

STATE OF MICHIGAN
IN THE TRIAL COURT FOR THE
46TH JUDICIAL CIRCUIT

46TH CIRCUIT TRIAL COURT,
Plaintiff/Counter-Defendant,

Crawford County

VS **Case No. 02-05951-CZ**

CRAWFORD COUNTY, et al.,
Defendants/Counter-Plaintiffs,
_____/

CRAWFORD COUNTY, et al.,
Plaintiffs, **Otsego County**

Case No. 02-10014-CZ

vs

OTSEGO COUNTY, **ORDER**
Defendant.
_____/

At a session of said Court, held in the
Kent County Courthouse, in the City of Grand Rapids,
in said county on May 30, 2003.

PRESENT: Hon. Dennis C. Kolenda
Assigned Circuit Judge

For the reasons stated in a written opinion being filed in these consolidated cases by this Court simultaneously

herewith:

IT IS HEREBY ORDERED AND ADJUDGED that the Trial Court's motion for partial summary disposition be, and the same hereby is, **DENIED.**

IT IS FURTHER ORDERED AND ADJUDGED that the Trial Court's motion to strike allegations of misrepresentation and fraud be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED AND ADJUDGED that Otsego County's motion for summary disposition be, and the same hereby is, GRANTED in large part. All claims predicated on alleged violations of the Uniform Budgeting and Accounting Act are **DISMISSED** with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that Crawford County's and Kalkaska County's motion for partial summary disposition seeking the dismissal of Counts I and II of the Trial Court's complaint in Case No. 02-05951-CZ be, and the same hereby is, **DENIED.**

IT IS FURTHER ORDERED AND ADJUDGED that Crawford County's and Kalkaska County's motion for partial summary disposition seeking the dismissal, in part, of Counts III and IV of the Trial Court's complaint in Case No. 02-10014-CZ be, and the same hereby is, **DENIED.**

IT IS FURTHER ORDERED AND ADJUDGED that the Trial Court's motion for sanctions be, and the same hereby is, GRANTED in part. The law firm of Cohl, Stoker, Toskey and McGlinchey, PC, is to pay to counsel representing the Trial Court all fees and expenses incurred by them in defense of the

allegation that the ~~Trial Court~~ misrepresented the anticipated cost of the retiree healthcare fund at issue in these cases.

IT IS FURTHER ORDERED AND ADJUDGED that Otsego County's motion for sanctions be, and the same hereby is, likewise GRANTED in part. Specifically, the law firm of Cohl, Stoker, Toskey and McGlinchey, PC, is to reimburse said county for all attorney fees and costs incurred by it in defense of all claims by Crawford County and Kalkaska County that Otsego County violated the Uniform Budgeting and Accounting Act.

IT IS FURTHER ORDERED AND ADJUDGED that counsel for the Trial Court and counsel for Otsego County submit to this Court, within 14 days hereof, itemized statements to support the amount of sanctions sought by them as authorized immediately above. Counsel for Crawford County and Kalkaska County may have seven days thereafter to respond to the reasonableness and necessity of the requested fees.

IT IS FURTHER ORDERED AND ADJUDGED that counsel for Otsego County submit to this Court, also within 14 days hereof, whatever information it has to substantiate the contention that counsel for Crawford County or Kalkaska County knew, or should have known that Otsego County did not know of the MERS actuarial studies which were the subject their claim of fraud by that county.

Because it resolves only a few of the claims in these cases, *this order does not close either of these cases.*

/s/ Judge Dennis Kolenda
Dennis C. Kolenda
Assigned Circuit Judge

STATE OF MICHIGAN
IN THE TRIAL COURT FOR THE
46TH JUDICIAL CIRCUIT

46TH CIRCUIT TRIAL COURT,
Plaintiff/Counter-Defendant,

Crawford County

VS **Case No. 02-05951-CZ**

CRAWFORD COUNTY, et al.,
Defendants/Counter-Plaintiffs,
_____/

CRAWFORD COUNTY, et al.,
Plaintiffs, **Otsego County**

Case No. 02-10014-CZ

vs

OTSEGO COUNTY, **OPINION**
Defendant.
_____/

Because these cases arise out of an intense dispute between a court and the counties which fund it over their inextricably intertwined, respective responsibilities for its operation and funding, this Court[1] must walk a tightrope.

[1] The traditional references herein to "this Court" are to the undersigned. All references to the court embroiled in the dispute at the heart of this case will be to "the Trial Court."

MERC v Detroit Symphony Orchestra, 393 Mich 116, 124 (1974).[2] This Court must both remain assiduously "mindful of the delicate balance of power in each branch of our tripartite form of government and of the dangers of stepping into a 'political thicket,'" *Seventeenth District Probate Court v Gladwin County Bd of Comm*, 155 Mich App 433, 437 (1986), *lv app den* 428 Mich 874 (1987) (hereinafter "the *Gladwin County* case"), and not be deterred or intimidated by the inherent difficulty of that task into shirking its duty to decide. A decision must be made for the good of the public whom those government entities serve.

Both the plaintiff Trial Court and the counties at odds with it must accept that one branch of government being told that it must yield to a proper decision by another branch is as much honoring the constitutional separation of powers as is one branch being told not to intrude into the prerogative of another. Both directives are the same. "... [A]n indispensable ingredient of the concept of co-equal branches of government is that 'each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches,'" *Second District Court v Hillsdale Co*, 423 Mich 705, 717 (1985) (hereinafter "the *Hillsdale County* case"), quoting *United States v Will*, 449 US 200, 228; 101 S Ct 471; 66 L Ed 2d 392 (1980). Otherwise, the governed will be stripped of the protections provided by the division of the government's powers.

When a dispute is between a court and another branch of government, it is, no doubt, disquieting to that other branch

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[2] Although it involved judicial review of administrative decisions, the *Detroit Symphony Orchestra* case involved balancing the responsibilities of independent branches of government, namely: the ability of the judiciary to review decisions by the executive.

to see the dispute submitted to the judiciary for resolution. The fear of a preference is understandable. That is, however, how our constitution divides powers. In our carefully crafted scheme of limited government, the courts have been assigned "responsibility for adjudicating each claim that comes before [them] ...,"*Berger v Weber*, 411 Mich 1, 12 (1981), including claims which arise out of disputes with the judiciary. *Wickey v Employment Security Comm*, 369 Mich 487, 492-493 (1963) (dissent per Souris, J.). In other words, for a court to refrain from ordering performance required of another co-equal branch, even if large sums of public money must be expended as a result, is to violate the constitutional separation of powers. *Jail Inmates v Wayne Co Sheriff*; 391 Mich 359, 364, 365, 369 (1974). Not utilizing an assigned power is no less inappropriate than is usurping a power assigned elsewhere.

No doubt, the surest way to assuage the concerns of the county parties would be to rule in their favor, if not consistently, at least with some frequency. Perhaps, they will prevail in the end. Counties have often prevailed in cases like these. This Court cannot rule in their favor now, however, because, for the reasons stated below, they are not entitled to prevail on most of the matters before the Court. The task of a court is, first and foremost, to resolve the issues before it as the facts and the law combine to dictate an outcome. *Berger v Weber, supra.* That is the rule of law. The people of this State, by the way they have divided the State's power, have confided certain decisions to the judiciary. For a court to do anything other than decide the cases confided to it in the way the law dictates would disobey the people, whose constitution is a charter for us all.

Instead, to demonstrate to the counties that its decisions are not motivated by favoritism, personal interests or personal predilections, this Court will adhere vigorously to the discipline of careful legal reasoning and the citation of precedent for every proposition underlying its decisions. Decisions so crafted demonstrate that they are based on a continuity of principle and on an inherited tradition. Having a majestic past commands authority and integrity because such a history rebuts any intimation of favoritism by one judge for other judges, Cox, *The Court and the Constitution* (1987 ed). Only a legally sound decision, not favoritism, can sport such a pedigree.

Statement of Facts

On May 31, 1996, the Michigan Supreme Court directed the following courts in Crawford, Kalkaska and Otsego Counties to begin a demonstration project to evaluate the feasibility of merging into a single, fully consolidated trial court: the 46th Circuit Court, which had long served all three counties; the 83rd District Court, to the extent it served Crawford County; the 87th District Court, to the extent it served Kalkaska and Otsego Counties; the Crawford County Probate Court; the Kalkaska County Probate Court; and the Otsego County Probate Court. Those courts were designated the 46th Circuit Trial Court (hereinafter "the Trial Court"). See Admin Order 1996-9.[3]

The Honorable Alton T. Davis, then the Chief Judge of the 46th Circuit Court, was appointed the Trial Court's Chief Judge with all the authority and responsibilities of that position for each participating court. The judges, magistrates and referees

[3] Originally, the demonstration project was to last two years. The project remains in place. By Admin Order 1997-12, which was entered on December 19, 1997, the projects were extended until further order of the Supreme Court.

within the three counties were assigned to serve the whole court, not just the counties where they had been elected or were employed, and the Trial Court was authorized to enter into cooperative agreements with all three counties to test the feasibility of consolidating essential administrative functions, such as personnel and financial management, as well as traditional judicial functions, such as case management.

Demonstration projects were also authorized in a handful of other counties (Barry, Berrien, Isabella, Lake and Washtenaw), but the 46th Circuit Trial Court is the only multi-county project, making consolidation there especially complex. The Circuit Court had employees in each county, and their pay and benefits varied. Each Probate and District Court was a distinct entity with employees whose pay, benefits and responsibilities also varied, and complicating even more its efforts at consolidation was the fact that the District Courts serviced counties which were outside the 46th Circuit and, therefore, were not part of the demonstration project, precluding full consolidation. The 83rd District Court also served Roscommon County, while the 87th District Court also served Antrim County.

Eventually, the Legislature moved Antrim County into the 86th District Court and gave Roscommon County its own District Court. While that realignment eased consolidation in some regards, it complicated consolidation in other regards. Because Antrim County had served as the Control Unit for the 46th Circuit Court's employees, the employees of the 87th District Court in Kalkaska and Otsego Counties, and the Otsego County Probate Court, a new Control Unit was necessary. Otsego County agreed to assume that responsibility. While Otsego County's willingness to assume new duties helped the consolidation effort, the judges of the Trial Court decided that

more was needed. Employee benefits needed to be improved, standardized, and their administration centralized. Between 1996 and 2000, the components of the Trial Court had experienced extraordinary employee turnover, a phenomenon the judges attributed to low benefits and fragmented policies. Standardizing and enhancing benefits was seen as the way to retain employees.

(1)

After extensive discussions with its components' employees, the Trial Court was able to achieve standardization of wages and most personnel policies. Some upgrades were accomplished, but there were also significant concessions from the employees. Some wages were frozen, and just about everyone gave back some fringe benefits. After much discussion, the employees agreed to switch from a $2.00 co-pay for prescription medicines to a $10.00 deductible, to switch insurance coverage to a less expensive and less comprehensive PPO, and to set aside a portion of each forthcoming pay raise to help fund healthcare benefits for retirees. The employees also agreed to give up longevity pay.

In return, the Trial Court agreed to seek an enhancement of the employees' pensions to the MERS[4] benefit level of B-4. Retirement packages for most court staff varied from B-1 to B-3 benefit levels, depending upon which court unit for which an employee worked. The employees of the 87th District Court participated in a simplified employee pension (SEP) plan consisting of individual accounts. Consolidation required, as a matter of pension law, a single plan for all court employees, and the B-4 level was proposed.

[4] MERS is an acronym for Municipal Employees Retirement System of Michigan.

Several bargaining ur[illegible] within the Kalkaska County Sheriffs Department had such benefits, as did elected and some appointed officials in Otsego County. The Trial Court also agreed to seek better healthcare benefits for retirees. Typically, relatively generous retirement programs are how government has attracted good employees from the private sector, despite the lower wages typically paid by the government. The judges of the Trial Court believe that those upgrades are financially feasible because they also believed that a sizeable share of the cost will be offset by savings from the employees' concessions.

(2)

Obviously, all changes in wages and benefits must be coordinated with the counties. They fund and administer them. Initially, the Trial Court worked with what was dubbed the Tri-County Court Committee; it was composed of representatives of the counties. Their objective was to reach tentative agreements on Trial Court administration and funding to be recommended to the three counties' Boards of Commissioners for ratification. Early on, and without difficulty, the Trial Court and the Tri-County Court Committee had reached consensus on numerous items, e.g., the centralization of administration. There was also a quick consensus on a formula for sharing the expenses of the consolidated Trial Court. Crawford County was to be responsible for 24%; Kalkaska County for 32%; and Otsego County for 44%. The Boards quickly ratified those recommendations. Finally, there developed a consensus on the proposed pension upgrade and retiree healthcare fund. Because ratification had been routine, it was expected that the boards would likewise accept the recommendations about pensions and retiree health care.

On August 29, 2000, the Crawford County Board of Commissioners met to consider the Trial Court's proposed retiree healthcare fund and pension upgrade. Not unexpectedly, there was much concern about costs. Some commissioners voiced concerns for "unfunded liabilities" and pressed for procuring actuarial studies from Blue Cross/Blue Shield on the anticipated cost of the retiree healthcare fund and from MERS on the cost of the pension upgrade. Eventually, motions were made to accept the healthcare fund and "to hold off in 2001 and 2002" the pension upgrade. Vigorous debate followed.

There was considerable confusion about the latter motion. Initially, its proponent characterized it as proposing that the Trial Court "should be asked to not put that [the pension upgrade] into effect until 2004." Then, she said that she was proposing that the pension upgrade be left "open for discussion" in the next budget cycle. The meetings were tape-recorded and have been transcribed for purposes of the motions at hand, but, unfortunately, the transcript is peppered with notations of "inaudible," that simultaneous speakers could not be deciphered, and that the "tape sounds like it stops and starts again." It is conceded that there are gaps in the recordings.

Ultimately, a vote was taken on both motions. There was a roll call vote on the motion to accept the healthcare proposal. There was a voice vote on the pension motion. In due course, minutes were prepared by the Crawford County Clerk and distributed to all the members of the Board in advance of their next meeting. Those minutes were then formally approved without correction by unanimous vote. They state that the

following resolutions had been unanimously adopted at the August 29 meeting:

> "MOTION by Hanson, seconded by Beardslee, to authorize the County [to] pay 24% of $50,000 ($12,000) for the year 2000 and that payment will increase at 4% per year until 2017, and at that time will pay an estimated $94,649 and that the Blue Cross/Blue Shield medical supplement payment per individual would be capped at [sic] the year 2000 at $4,087.00 [and] would increase at 4% per year until 2017 for an employee to be eligible for $7,654.00 per year. Roll call: Corlew - aye; Golnick - aye; Hanson - aye; Pinkelman -absent; Wieland - aye; Beardslee - aye; Motion carried.
>
> MOTION by Wieland, seconded by Hanson, to request the [Trial] Court [to] not implement the MERS B-4 upgrade at this time, but recognize the change in the 2001/2002 budget cycle. Ayes (5) five; nays (0) none; absent (1) one, Motion carried."

Shortly after the meeting, but still that afternoon, Judge Davis was informed by the Trial Court's administrator that an arithmetic mistake had been made in calculating the base annual Blue Cross premium for the first year of the retiree healthcare fund; that premium represented the benefit to retirees which "would be capped." Judge Davis immediately contacted the Chair of the Board to inform her of the mistake. She and he met, and she suggested substituting the sum of $5,763.00. Judge Davis agreed. The Chair reviewed the new figure with the other commissioners still present in the county building. No objection was expressed then, or, for a considerable time thereafter.

The erroneous low figure was, it turns out, no surprise to Crawford County. Based on experience with Blue Cross/Blue Shield, it knew that the premium to be paid for the benefits being sought would be at least $5,763.00 figure. That is what was being paid for comparable benefits for non-court county employees. In his deposition, the Crawford County Controller testified that he knew "precisely" what the premium would be and that at least one commissioner, the most vocal objector to accepting the Trial Court's proposal, although he voted for it in the end, also knew that "a mistake was made." The controller also acknowledged in his deposition, as did some commissioners in their depositions, knowing that the projected 4% annual increase "was wrong." Then, discovery unearthed a letter in which the Crawford County Controller wrote:

> "... Crawford [County] had passed a motion to approve the caps in retirement healthcare insurance, knowing the numbers were wrong as a way to 'call the [Trial] Court's bluff' Crawford [County] never agreed to the B-4 benefit in retirement because we could never receive an actuarial cost on the benefit.
>
> ***
>
> ... During this meeting, the Board agreed to fund the retirement healthcare as proposed for 17 years. They did not agree to the terms and conditions outlined in the proposed contract. They agreed to this because they believed the information provided on this issue by the Courts was erroneous and would cause the Court to react..."

With regard to the pension upgrade, some Crawford County Commissioners testified in depositions that they understood the words "recogniz[ing] the change in the

2000/2001 budget cycle" to mean "bring[ing] ... back" that proposed upgrade the next year, i.e., to have, in effect, tabled that particular proposal. All of that county's commissioners have submitted affidavits which aver:

> "It was my belief that the Crawford County Board of Commissioners' intent was not to approve the implementation of the MERS B-4 Plan the next year, but rather [to] wait until after receiving actuarials from MERS to consider the change during the 2000-2001 Budget Cycle."

Months before the meeting of August 29, 2000, the Trial Court's administrator had received from MERS actuarial studies for pensions with a B-4 benefit level, but not the same benefit program which the Court was proposing for its employees. The proposals had changed since those studies had been requested. They did not consider an E-2 rider, nor what is described as "F-5050/20," and those studies presumed an 8-year vesting period, not the 10-year vesting period ultimately proposed. The studies were not passed along to Judge Davis or to the Board of Commissioners because the administrator did not consider them pertinent. He came to that conclusion because of the first paragraph in each:

> "The valuation enclosed does address costs and rates for ONLY the specific benefit program as requested. These costs and rates may not be reliably combined or modified to yield accurate actuarial results for other benefits not included in the original requests. Thus, if the parties agree to *another* benefit program (or combination of programs) not identical to those contained in the current valuations, you are obligated to advise MERS in writing as soon as possible so that MERS actuary

> may determine the required contribution to support the benefit plan selected" [emphasis in original].

That disclaimer tracked a directive stated on the form which MERS had provided to the Trial Court to request actuarial studies, and which that Court's administrator had filled out, signed and submitted. The form's final paragraph read: "...[I]f another benefit program is selected or negotiated an Amendment to Request for Valuation must be submitted." Crawford County's own independent auditor had explained why at the meeting where the pension upgrade was discussed and voted on. He explained that pensions consist of numerous variables, and that "strange things happen" when any of those variables are altered.

On September 12, 2000, the Kalkaska County Board rejected both the retirees' healthcare fund and pension upgrade proposed by the Trial Court. However, at its meeting on October 10, 2000, that Board voted "to approve the benefit program for the courts as presented." That Board had been given the correct cost for the healthcare fund, but the MERS actuarial studies were not disclosed for the same reason they had not been presented to the Crawford County Board. The Otsego County Board likewise approved the pension upgrade and the healthcare fund for retirees proposed by the Trial Court. Its resolution reflected, too, the correct "cap" for retiree healthcare benefits, but it, too, was not told of the MERS actuarial studies.

Immediately after the Crawford County Board voted, Judge Davis offered to draft a document to memorialize his assurances to that Board that the healthcare fund would pay benefits only so long as employee contributions kept it solvent. Some commissioners had been concerned about the

prospect of a sizeable unfunded liability. Those commissioners appeared placated by the limitations accepted by Judge Davis. He promptly submitted the promised document, and it said what had been promised, but Crawford County delayed signing it, and, ultimately refused. The Chairs of the Kalkaska County and Otsego County Boards did sign, however, immediately upon presentation.

On December 4, 2000, Judge Davis issued an implementation order which recited that "[e]ach of the Funding Units has passed resolutions accepting the benefit shifts which are governed by this order." True to its title, that order directed implementation of the various changes in employees' benefits, including their concessions. Thereupon, all the Trial Court's employees were transferred to a central payroll administered by Otsego County; the Blue Cross/Blue Shield coverage was changed; the co-pay for prescription drugs was increased; and longevity pay was phased out. Both Crawford County's and Kalkaska County's MERS assets were transferred to Otsego County, and it began paying the invoices from MERS, which it continues to do, and billing the other counties for their shares. The healthcare fund began in 2001 and now has a substantial balance. Otsego County and the employees are making their promised contributions, and until recently, Kalkaska County contributed its share.

(3)

On December 11, 2001, the Kalkaska County Board rescinded its resolution of October, 2000, approving the retiree healthcare fund and the pension upgrade. It did so, it said, to "review the thick packets from Crawford County" and to "join with Crawford County for some serious discussion." On February 1, 2002, Crawford County passed a resolution

rescinding its acceptance of the healthcare fund for retirees. Its resolution of rescission was silent with regard to the pension upgrade. The Otsego County Board has not rescinded its acquiescence in the benefits program. It continues to honor that acceptance and, in effect, to partially subsidize the other counties, while this case remains unresolved, by making payments for all the Trial Court's employees, payments for which it is not being reimbursed. The employees have not rescinded their concessions, and the counties have retained the benefits of those concessions.

Statement of Proceedings

When a facilitated mediation, conducted jointly by the Michigan Association of Counties, represented by a commissioner from Eaton County, and the Michigan Judges' Association, represented by Judge Richard Lamb from Kalamazoo County, failed to achieve an amicable resolution, Chief Judge Davis gave the notice required by Admin Order 1998- 5(111)(1) of the Trial Court's intent to sue Crawford County. At that time, both Otsego and Kalkaska Counties were cooperating. When the mandatory 30-day waiting period passed without a resolution, the Trial Court filed Case No. 02-5951-CZ against Crawford County. That was done on November 19, 2002.

Count I alleges breach of an explicit contract. The Trial Court alleges that the three counties had come to an agreement on, among other things, the pension upgrade and the healthcare fund for retirees, but that Crawford County had reneged on its commitment. A breach of an implied contract is alleged in Count II. Specifically, the Trial Court contends that, because Crawford County has had the benefit of the concessions traded for the healthcare fund and the pension upgrade, it

cannot legally refuse to fund those benefits, even if there is no actual agreement regarding them. Count III alleges that Crawford County failed during the 2001 and 2002 budget years to provide sufficient funds to the Trial Court to enable it to operate. Count IV makes the same claim regarding the 2003 budget year. According to the *Hillsdale County* case, courts may institute suit against their funding units if there is disagreement about essential funding.

Crawford County answered the Trial Court's complaint, first, with denials of any contract, whether explicit or implied, and of any underfunding. It, then, filed a countercomplaint. Its Counts I and II seek a declaratory judgment that the Trial Court exceeded its authority when it implemented the pension upgrade and retirees' healthcare fund. Count III alleges that the Trial Court misrepresented the cost of the retiree healthcare proposal and the lack of actuarial projections for the pension upgrade. "Silent fraud" is alleged in Count IV. Specifically, Crawford County asserts that the Trial Court had a duty to disclose the actuarial projections which it did have, even if they did not relate to the specific pension upgrade under consideration. Those misrepresentations, assert Crawford County, vitiated any agreement which might otherwise be enforceable.

On the same day that Crawford County filed its counterclaim, Kalkaska County intervened in Case No. 02-5951-CZ. That county is asking, for all practical purposes, for permission to back out of its acceptance of the benefits enhancement on the same grounds that Crawford County is seeking to avoid any acceptance. That position was not unexpected because, just a few days earlier, Crawford and Kalkaska Counties had filed Case No. 0210014-CZ against Otsego County. In that case's Counts I and II, those counties

accuse Otsego County of improperly implementing the pension upgrade and the retirement healthcare fund, and Count III alleges that Otsego County colluded with the Trial Court to withhold key information about the cost of the pension upgrade.

The first rulings asked of this Court related to attorney fees. The Trial Court claimed that the counties are obligated to pay for the attorneys assisting it in these cases and in the dispute which preceded their filing. This Court agreed in an opinion dictated from the bench. Later, it decided that the counties' obligation for fees should be equal, but opined that Otsego County might have a claim against Crawford and Kalkaska Counties for reimbursement of what it had to pay.[5] It is those counties which are creating the dispute. Otsego County has implemented the Trial Court's benefits proposals, and it is siding with that court in these cases. On April 30, 2003, Otsego County filed a counterclaim in Case No. 02-10014-CZ asking for reimbursement. That counterclaim is not now before this Court. The time for answering it has just expired.

Based on disclosures during intense, expedited discovery, all the parties have filed motions for summary disposition and/or partial summary disposition. It is those several motions which are being addressed and resolved by this opinion. Crawford and Kalkaska Counties contend that it is indisputable that there was no agreement, either explicit or implied, to enhance any of the Trial Court's employees' pensions or post-employment healthcare benefits, and that those benefits are not essential to the functioning of the Trial Court, meaning that their funding cannot be mandated. The Trial Court responds that Crawford and Kalkaska Counties' allegations of fraud are frivolous and that, therefore, because

[5] An appeal of those rulings is pending.

its contract claims have been shown to be indisputable, it is entitled to summary judgment on its Counts I and II. Finally, the Trial Court contends that Counts III and IV present fact questions.

Otsego County filed a motion which insists that there is absolutely no evidence of any fraud, intentional or innocent, by it and that all of its actions as the control unit for the Trial Court have been proper. In their brief in response to Otsego County's motion, counsel for Crawford and Kalkaska Counties withdrew the claims of fraud by Otsego County. That withdrawal was confirmed by their counsel on May 1, 2002 at oral argument on the several motions before this Court. At oral argument on all the pending motions, their counsel identified the Uniform Budget and Accounting Act (hereinafter "UBAA") as the principal basis for their remaining claim.

Finally, the Trial Court and Otsego Counties have also filed motions asking for sanctions. They both insist that the other counties' fraud allegations in Case No. 02-05951-CZ have always been groundless, and Otsego County insists, in addition, that their allegations in Case No. 02-10014-CZ of unauthorized conduct by it are also groundless. Because groundless claims violate MCR 2.114(D), sanctions are mandated by MCR 2.114(E), Otsego County contends. The Trial Court asks that an appropriate portion of its attorney fees be assessed against opposing counsel. Otsego County asks that it be reimbursed a portion of its fees by Crawford and Kalkaska Counties.

Applicable Law Applied

This Court concludes that the claims by Crawford and Kalkaska Counties of fraud by the Trial Court are without any

merit. This Court also concludes, however, that, because there remain significant disputed questions of fact, the Trial Court's several claims in Case No. 02-05951-CZ must go to trial for resolution, although on narrowed contentions. This Court also concludes that Crawford and Kalkaska Counties lack standing to complain that Otsego County has violated the UBAA. Hence, because they have withdrawn their claim of fraud by Otsego County, that county is entitled to the dismissal of Case No. 02-10014-CZ to the extent it is based on the UBAA. Finally, some sanctions are in order.

A. Trial Court's Contract Claims

Crawford and Kalkaska Counties contend that it is indisputable that there is no enforceable agreement with the Trial Court. Specifically, those counties insist (i) that, while Otsego and Kalkaska Counties agreed to the retiree healthcare fund, Crawford County agreed only to something else, making that County's resolution a counteroffer, not an acceptance, (ii) that that counteroffer was rejected by the Trial Court as "unacceptable," and (iii) that, therefore, there was no agreement about the retiree healthcare fund. The agreement of the other two counties was not enough, argue Crawford and Kalkaska Counties, because agreement by all three counties was necessary. Crawford County also insists that it never agreed to the pension upgrade. Finally, Crawford County insists that any acceptance by it of either benefit was conditioned on a mutually-acceptable written memorialization, which was never achieved. This Court disagrees with all those contentions.

(1)

It is true that the Crawford County resolution

acquiescing in the retiree healthcare fund capped the annual benefit at $4,000.00 per employee, and capped the annual increase at 4%, while the proposal to which the other counties agreed contained a cap of $5,763.00. Under circumstances other than those presented by this case, the Crawford County resolution would likely have been a counteroffer, which, because never accepted, would mean that no contract materialized. When two of three necessary parties agree to one cost figure, while a third necessary party agrees to another cost figure, there likely is no agreement at all, contend the counties, and this Court agrees. *Dubey v Macomb Concrete Corp*, 81 Mich App 662, 673 (1978). Those principles do not apply, however, to this case.

As will be discussed in much greater detail below, when the Crawford County Board adopted its resolution agreeing to a healthcare fund with a benefit cap of $4,087.00 for the first year, plus 4% thereafter, it, in the person of its controller and some of its members knew that the cap had to be $5,763.00 to be feasible and that annual increases would likely be greater. As a matter of common sense, practicality, and fairness, the law has long held that, when one side of a negotiation knows that a proposed term carries a meaning different than appears on its face, acceptance is acceptance of the proposal as actually understood, not as verbalized. Cf., *Biltmore Land Co v Estate of Munro*, 271 Mich 125, 129 (1935); and *Ardis v Grand Rapids & Indiana Ry Co*, 200 Mich 400, 414 (1918).

The effect of that principle applied to the facts of this case is the following: Because Crawford County knew that the cost per retiree of the health care fund would be $5,763.00, and that the annual increases would exceed 4%, its Board of Commissioners' resolution agreeing to that fund was an agreement to those amounts, even though the resolution

articulated different numbers. That means, in turn, that the Crawford County resolution of August 29, 2000, was not a counteroffer, but was an acceptance of the Trial Court's proposal on the subject. Hence, when Otsego and Kalkaska Counties also agreed to the fund with those annual caps, there was a complete acceptance of the Trial Court's offer.

(2)

While not a model of draftsmanship, the resolution adopted by the Crawford County Board regarding the pension upgrade admits of only one interpretation. Inartful or clumsy wording does not necessarily mean an ambiguity, *Raska v Farm Bureau Ins Co*, 412 Mich 355, 362 (1982); and *Meagher v Wayne State University*, 222 Mich App 700, 722 (1997), *lv app den* 457 Mich 874 (1998), and that is the situation presented by the Crawford County resolution. A "request" that the Trial Court "not implement the MERS B-4 upgrade at this time," but "recognize the change in the 2000-2001 budget cycle," means that the Board agreed to the upgrade. Those words cannot be contorted to say that the proposal to upgrade the pension was rejected. No words conveying that message are to be found in the resolution. Its words convey quite the contrary message. Had the Board rejected the proposal, there would be no need to "request" deferral of its "implement[ation]." A rejected proposal will never be implemented, so "requesting" a deferral and "recogniz[ing]" it later are meaningless in the context of a rejected proposal. The use of those words is intelligible only if in reference to an accepted proposal.

Admittedly, the discussion which preceded the vote on the resolution suggests a desire by some to table the proposal until the next year, and, plainly, the affidavits from the

commissioners aver that they did not mean to accept the proposal, even on a deferred basis. It has long been the law of this State, however, dating back to *Stevenson v Bay City*, 26 Mich 44, 45 (1872), that the powers of a county board "are exercised through its official resolutions and proceedings, recorded in its official minutes," *Crain v Gibson*, 73 Mich App 192, 200 (1977), *lv app den* 400 Mich 828 (1977), so that "their import cannot be altered or supplemented by parol testimony." *Tavener v Elk Rapids Rural Agricultural School District*, 341 Mich 244, 251 (1954). Why was explained as follows:

> "When the law requires municipal bodies to keep records of their official action in the legislative business conducted at their meetings, the whole policy of the law would be defeated if they could rest partly in writing and partly in parol, and the true official history of their acts would perish with the living witnesses, or fluctuate with their conflicting memories. No authority was found, and we think none ought to be, which would permit official records as either partial or uncertain memorials. That which is not established by the written records, fairly construed, cannot be shown to vary them. They are intended to serve as perpetual evidence, and no unwritten proofs can have their permanence." *Alcona County v Alcona Probate Judge*, 311 Mich 131, 142 (1945), quoting *Stevenson v Bay City, supra*.

In addition, the public has a right to know what its elected officials have done, so it can measure their performance. If formally-adopted resolutions can be explained away by affidavits, or other parol evidence, electors cannot evaluate those in office. *Collins v Detroit*, 195 Mich 330, 334 (1917). Finally, there is a very practical reason for an irrebuttable

conclusion that the Crawford County Board did not table the Trial Court's proposal to upgrade its employees' pensions, but acquiesced in that proposal. Verbatim records of commission meetings are not always available, and the quality of any recordings can be problematic. In these cases, for example, portions are inaudible, unintelligible, or missing, adding to the difficulty of accurately deducing from any debate what was intended. Minutes and resolutions, on the other hand, can be carefully crafted and accurately recorded. Hence, when the Crawford County Board approved minutes memorializing a resolution adopted a month earlier, it created a bar to any effort to explain that resolution.

(3)

While there can be no dispute that the Crawford County Board accepted the Trial Court's proposal to upgrade its employees' pensions, there remains a factual question about whether there is an enforceable agreement to do so. It is unclear whether those counties' resolutions were meant to voice agreement or whether a signed contract was a condition of there being any agreement. If not, the three resolutions combine to constitute an agreement which this Court must enforce. If a signed contract was intended, there may not have been any contract, for no memorialization acceptable to all ever occurred.

"...[W]here agreement has been expressed on all the essential terms of the contract, the mere fact that the parties manifest[ed] an intention to prepare a written memorial of their agreement does not render the oral contract unenforceable merely because the writing is never prepared. On the other hand, if the written document is to contain any material term upon which the agreement has not already been reached, there is no binding contract." *Scholinck's Importers-Clothiers,*

Inc v Lent, 130 Mich App 104, 109 (1983). The latter is also true if the parties manifested an intent not to be bound unless and until the execution of a written contract. *DiPonio Equipment Co v Highway Dept*, 107 Mich App 756, 761 (1981). See also *Adolph v Cookware Co of America*, 283 Mich 561, 569 (1938).

Deciding which is the situation is very fact specific and, as such, requires a trial, *Id.*, except, perhaps, in the most unusual circumstances. All the following needs to be considered:

> "In determining which view is entertained in any particular case, several circumstances may be helpful as: Whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended to be the final closing of the contract." *Michigan Broadcasting Co v Shawd*, 352 Mich 453, 456 (1958), quoting *McConnell v Harrel & Nicholson Co*, 183 Mich 369, 373-374 (1914).

What is plain is that the mere intention that there be a document does not establish that the document was to be the contract such that a failure to concur in one means no deal. That is a factor to be considered, but there are numerous other factors. A review of the record in this case discloses that those factors could, depending upon an ultimate assessment of them,

lead to divergent conclusions. There is, therefore, a requirement that this case proceed to trial, unless the contract is invalid, which it is not, to determine whether the resolutions adopted by the Otsego, Crawford and Kalkaska Boards are themselves reflective of an agreement or whether they required for their effectuation the further and final act of signing a document on which the three counties and the Trial Court agreed.

(4)

That Crawford and Kalkaska Counties rescinded their resolutions does not mean that there is no enforceable agreement with the Trial Court. "Legislative acts, as distinguished from contracts, do not tie the hands of succeeding legislatures," *Gale v Oakland County Board of Supervisors*, 260 Mich 399, 404 (1932), but, it necessarily follows, succeeding boards cannot unilaterally revoke contracts. Changing or revoking agreements must be done mutually, *Rowe v Montgomery Ward*, 437 Mich 627, 651 (1991); and *Curtis v East Saginaw*, 35 Mich 508 (1877). Therefore, if their initial resolutions reflect an actual agreement, not merely a tentative agreement still subject to finalization in a written document, neither the Crawford County Board nor the Kalkaska County Board, whether acting separately or together, could rescind that agreement. Otsego County and the Trial Court had to concur, which they did not.

B. The Trial Court's Inherent Authority Claims

As noted earlier herein, Counts III and IV of the Trial Court's complaint allege that Crawford County is refusing to fund the Trial Court at a level which will enable it to perform its necessary core functions. As also noted earlier herein, given Kalkaska County's intervention in the case, and its eventual

withholding of funds, the same complaints are effectively made against it. Those two counties now contend that those counts ought be dismissed. Because the Trial Court has acknowledged that no employee has yet quit for want of either benefit, it cannot possibly be established, both counties contend first, that either is necessary for the Trial Court's functioning. This Court disagrees. More significantly, so has the Michigan Court of Appeals. Both counties also contend that the benefits upgrades cannot be deemed reasonable because they would make the Trial Court's employees the counties' best-compensated employees. Again, this Court disagrees.

(1)

In the *Gladwin County* case, the trial court which heard that case determined that the plaintiff court had proven by the requisite clear and convincing evidence that a compensation structure proposed by it and rejected by the funding unit was reasonable and necessary to enable the Court to carry out its assigned functions, even though the lack of that proposed change had not yet adversely affected either efficiency or employee loyalty. *Id.*, at 454. The plaintiff court prevailed because the trial court was persuaded that the dispute over salary structure had created morale problems among employees and that not changing the salary structure as proposed would eventually engender employee dissatisfaction which would eventually adversely affect performance and productivity.

The Court of Appeals affirmed, finding that the trial court's conclusions were not clearly erroneous. In other words, the Court of Appeals rejected the very argument advanced in this case by Crawford and Kalkaska Counties, namely: that a court cannot adequately prove the necessity for funds unless it can demonstrate an actual adverse effect from not having

them. Proving the likelihood of an effect in the future is sufficient. Hence, given the expected trial testimony from the Trial Court's Chief Judge and from its expert, Crawford and Kalkaska Counties are not now entitled to summary judgment. If their testimony is persuasive, the showing found adequate in the *Gladwin County* case will also have been made in this case. That determination can occur only at a full trial.

(2)

The benefits at issue are not necessarily excessive because they are relatively generous. That is a consideration, but not necessarily a dispositive consideration. If the wages and benefits of other employees are not themselves substantial, being higher does not become absolutely high, but only the upper side of low or middling. Furthermore, the courts' employees may have much different job responsibilities than other county employees. If so, higher wages and benefits may fit. Finally, generous wages and benefits may be what are required for the Trial Court to attract and retain adequately qualified employees. All of those considerations are fact-specific. Therefore, they cannot be resolved now. This Court has no evidence regarding any of them. All it has is the contention that the benefits at issue will make the Trial Court's employees the best compensated employees of the counties. This Court needs evidence to determine the significance of that contention.

(3)

Nor, however, is the Trial Court entitled to summary judgment, even though this Court is rejecting the reason advanced against its claims regarding the retiree health care fund and the pension upgrade. In another kind of case, this Court would likely conclude that the failure of a defendant's

argument and the lack of any proffered contrary evidence would entitled plaintiff to judgment. Given, however, the case with which questions of separation of power must be resolved, the Trial Court's claims need to be aired fully in a public forum. Those claims should not be decided summarily. Hence, this issue will not be decided until this Court has heard live from the several witnesses, has had an opportunity to access their credibility and the persuasiveness of their testimony, and has afforded the interested public an opportunity to watch.[6]

C. Claims of Fraud by the Trial Court

Michigan is one of a minority of jurisdictions which recognize as actionable both fraud and innocent misrepresentations, i.e., both deliberate falsehoods and honest mistakes made in good faith. *USF&G v Black*, 412 Mich 99, 116-118 (1981); and *Schwader v Heron-Clinton Metropolitan Authority*, 329 Mich 258, 267 (1951). If proven convincingly, *Flood v Welsh*, 334 Mich 583, 591 (1952), either can be a basis to recover damages or, in the case of a contract entered into based on one or the other may be used as an affirmative defense to affect rescission or reformation. *USF&G, supra*, at 118, fn 10; *Schwader, supra;* and *Lash v Allstate Ins Co*, 210 Mich App 98, 103 (1995). At oral argument on the parties' motions, counsel for Crawford and Kalkaska counties made clear that their fraud claims are of the innocent variety being used in the latter fashion. For the reasons stated immediately below, those claims cannot succeed.

(I)

[6] Nothing said in this opinion should be read as a prediction of how this case will be resolved after a trial. The evidence presented then will be genuinely assessed and evaluated then, and only then. Cf., *People v Cobbs*, 443 Mich 276, 283 (1993).

Fraud and innocent misrepresentation actions are both "substantially similar" and "significantly different." *USF&G, supra,* at 118. In this case, it is the similarities which resolve the claims that any contract between the Trial Court and Crawford, Kalkaska and Otsego Counties was induced by a misrepresentation. First, "to establish either [a] fraudulent or an innocent misrepresentation, a party must demonstrate that he [she or it] acted in reliance upon the alleged misrepresentation." *McKinstry v Valley Obstetrics-Gynecology Clinic, PC,* 428 Mich 167, 187 (1987). In other words, a fraud nor an innocent misrepresentation "is not perpetrated upon one who has full knowledge to the contrary of a representation. *Montgomery Ward & Co v Williams,* 330 Mich 275, 284 (1951).[7]

It necessarily follows that Crawford County cannot avoid any agreement made by it regarding the retiree healthcare fund by claiming that the Trial Court misrepresented the annual cost of that benefit. As stated more elaborately in this opinion's Statement of Facts, the Crawford County controller and some of its commissioners not only knew that the $4,000 annual cost and the 4% annual increase put forward by the Court were incorrect, they

[7] Although there are some cases which have held that "[t]here can be no fraud where a person has the means to determine that a representation is not true," e.g., *Nieves v Bell Industries,* 204 Mich App 459, 464 (1994); and *Webb v First of Michigan Corp,* 195 Mich App 470, 474 (1992), those were cases in which the parties claiming fraud had actual knowledge that a representation was not true, knowledge which was ignored. Those were not cases in which the party claiming to have been defrauded could have, but did not, conduct an investigation which would have disclosed the misrepresentation later complained of. Hence, those cases do not represent an exception to the longstanding rule that "[t]he fact that [a] plaintiff might have ascertained the situation from others is no defense ..." See, e.g., *People's Furniture and Appliance Co v Healy,* 365 Mich 522, 526 (1962); *Baedeker & Associates v Hamtramck State Bank,* 357 Mich 435, 441 (1922); and *Schupp v Davey Tree Expert Co,* 235 Mich 268, 271 (1926).

actually knew the correct figures for both. That all of the commissioners may not have known of those mistakes, if they did not, does not change the fact that the County knew, because its principal administrator knew. Cf., *USF&G, supra,* at 126. See also *Chelsea Associates v Rapanos,* 527 F2d 1266, 1269, 1273 (6th Cir, 1975). Under those circumstances, a fraud was "not perpetrated." *Williams, supra.*

That knowledge also means that Crawford County cannot complain that its Board was fraudulently induced into agreeing with the pension upgrade, if it is found to have agreed, by the Trial Court's failure to disclose the actuarial projections which it had received from MERS projecting the cost of other pension upgrades. While, as noted below, a misrepresentation is not, ordinarily, of no moment just because it could have been discovered with due diligence, "one cannot rely on a misrepresentation where he [she or it] knows other representations in the same transaction are false." *Phillips v Smeekens,* 50 Mich App 693, 697 (1973). The latter knowledge provides too much notice to be ignored. While a party has a right to rely on what it is told, once it knows that inaccurate representations have been made, it must be cautious and check on the rest of what it is told.

(2)

The other similarity which is pertinent to this case is a key component of the definition of silent fraud. While '" [a] fraud may be consummated by suppression of facts of the truth, as well as by open false assertions,' *USF&G, supra,* at 125, quoting *Fred Macey Co v Macey,* 143 Mich 138, 153 (1906), "mere nondisclosure is insufficient. There must be circumstances that establish a legal duty to make a disclosure." *Hord v ERIM* (aft rem), 463 Mich 399, 412 (2000). Given their particulars, the

Trial Court had no duty to disclose the actuarial studies which it had. They were immaterial.

Deciding whether a duty exists is a matter for the court, cf., *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500 (1988); and *Moning v Alfono*, 400 Mich 425, 436-437 (1977), and it is plain, on the unique facts of this particular case, that the Trial Court did not have a duty to disclose the actuarial studies which it had done. Not only did none of those studies relate to the pension upgrade being proposed by the Trial Court, but related exclusively to upgrades which the Court had decided not to propose, a disclaimer in each established that they were not material to the different upgrade being proposed the Trial Court. Those disclaimers, which were quoted earlier, are restated here to avoid the need to search this opinion for them:

> "The valuation enclosed does address costs and rates for ONLY the specific benefit program (as requested). These costs and rates may not be reliably ....- combined or modified to yield accurate actuarial results for any other benefit not included in the original request. Thus, if the parties agree to *another* benefit program (or combination of programs) not identical to those contained in the current valuation, you are obligated to advise MERS in writing as soon as possible so that [a] MERS' actuary may determine the required contribution to support the benefit plan selected."

That immateriality is confirmed by the application form which the Trial Court filled out and submitted to MERS. Its last paragraph cautioned that "if another benefit program is selected or negotiated, an Amendment to Request for Valuation must be submitted." Combined, those

statements say unequivocally that the actuarial studies the Trial Court had were not only immaterial, but could not be reliably used to project the cost of "any other benefit." Crawford and Kalkaska Counties' own auditor concurred. As he put it, "strange things happen" to its costs when a pension's variables are changed.

The question of duty is one for the Court because it requires assessing competing policy considerations, *Fridman v Dozorc*, 412 Mich 1, 22 (1981), a balancing-type assessment best done by a court. It cannot be sound public policy to insist that a party ignore, which a duty to disclose would do, an unequivocal disclaimer, which is conceded to have been correct, that certain information is not accurate for purposes of the transaction at hand, which is what the disclaimer from MERS plainly said. If fair dealing requires disclosure of such information, there is nothing which, in retrospect, cannot be found to have been disclosable, making it virtually impossible for anyone to be fully honest.

At a minimum, holding it to have been an actionable, honest mistake to not disclose information which itself actually said it was immaterial would intimidate the parties to negotiations into disclosing vast amounts of useless and unnecessary information, badly burdening the process and obscuring the valuable information. The only information which there is a duty to disclose is that which renders untrue, or misleading, previous representations. *USF&G, supra*, at 127. Nothing in the MERS actuarial studies in the possession of the Trial Court's administrator rendered untrue or misleading in the least any information about the pension upgrade proposed by the court. Those studies were for other pension upgrades. Therefore, there was no "silent fraud."

D. Otsego County's Motion

In Case No. 02-10014-CZ, Crawford and Kalkaska County claim that Otsego County, acting as the agreed-upon Control Unit for the Trial Court, exceeded its authority by implementing the retirees' healthcare fund (Count I) and the pension upgrade (Count II) when Crawford County had not agreed to either benefit enhancement. Doing so violated the UBAA, contend those counties. In Count III, Crawford and Kalkaska Counties accused Otsego of itself deliberately withholding actuarial studies regarding the pension upgrade, but that count was withdrawn when its sustainability was challenged.

After carefully studying all of the papers submitted to it, this Court is not quite sure of the legal basis or bases for Counts I and II. It is unclear whether Crawford and Kalkaska Counties premise those counts exclusively on alleged violations of the UBAA, or whether they claim that Otsego County violated that act, as one theory, and, as a second theory, that there must be a right to sue for acting without authority. To the extent Counts I and II are based on the UBAA, those counts must be dismissed. If that is their only basis, those counts are to be dismissed in their entirety. If there is some other basis, that theory is dismissed, but any other theory will be resolved later upon adequate explication.

Crawford and Kalkaska Counties lack standing to invoke the UBAA, specifically, to allege violations of that act. "Any action," civil or criminal, alleging a violation of that statute "must be initiated" by the Attorney General or by the local prosecuting attorney. *Rayford v Detroit*, 132 Mich App 248, 257 (1984), *lv app den* 419 Mich 938 (1984); and *Firefighter's*

Ass 'n v Detroit, 199 Mich App 129, 133 (1993).[8] While *Rayford* and *Firefighter's Ass'n* differ in one regard from Case No. 02-10014-CZ, the difference turns out to be legally insignificant. As a result, those cases are not distinguishable, but fully applicable here. *McNitt v Citco Drilling Co*, 60 Mich App 81, 84-85 (1975), *aff'd* 397 Mich 384 (1976).

Neither of those cases involved one government entity suing another. Both cases involved private parties suing a municipality. In some circumstances, that might be a significant distinction, but not with regard to enforcement of the UBAA. The conclusion that the Attorney General and prosecuting attorneys have exclusive enforcement powers follows inexorably from the text of the statute. It says, in so many words, that the Attorney General "shall ... cause to be instituted such proceeding[s]" which are necessary to respond to violations of the act, and that the Attorney General or prosecuting attorney "shall institute civil action[s]" to recover monies expended, collected, or not accounted for in violation of the act. MCL 141.431. When a statute contains such explicit authorizations, it authorizes nothing else. *Sebewaing Industries, Inc v Sebewaing*, 337 Mich 530, 545 (1953). In sum, Crawford and Kalkaska Counties can complain to the Attorney General and/or to the Otsego County Prosecuting Attorney, but they cannot sue.[9]

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[8] In *Detroit City Council v Stecher*, 430 Mich 74, 80-81 (1988), our Supreme Court explicitly reserved deciding whether only the Attorney General and/or prosecuting attorneys have standing to complain about violations of the UBAA, but such a reservation does not undermine an outstanding holding by the Court of Appeals. *Maciejewski v Breitenbeck*, 162 Mich App 410 (1987)

[9] That Otsego County did not object to Crawford and Kalkaska Counties' lack of standing does not preclude this Court basing a ruling on that issue. While a court is obligated to consider only issues which are raised by a party, it is empowered to go beyond them and to address any issue which, in its judgment, justice requires be considered and resolved. *Paschke v Retool Industries* (on reh), 198 Mich App 702, 705 (1993), *rev'd on other grounds* 445

E. Sanctions

The summary dismissal of claims or striking of defenses does not necessarily mean that they were asserted in violation of MCR 2.114(E). *Kitchen v Kitchen*, 465 Mich 654, 663 (2002); and *Neitzke v Williams*, 490 US 319; 109 S Ct 1827; 104 L Ed 2d 338 (1989). While such a decision by the court means, obviously, that all pertinent facts were undisputed and/or indisputable, the granting of such relief does not necessarily mean that the underlying legal arguments were so defective that they should never have been made. Summary disposition can be granted when legal contentions are close, but ultimately unavailing. Then, sanctions are inappropriate. These cases involve both scenarios.

(1)

With regard to the claim that the Trial Court misrepresented the anticipated annual healthcare payment per retiree, and the anticipated annual increase, unremarkable law of longstanding was applied to indisputable facts. Crawford County knew that the figure given to it by the Trial Court was incorrect, and the law has long been that "[a] fraud is not perpetrated upon one who has full knowledge to the contrary of a representation." *Montgomery Ward & Co v Williams, supra.* Therefore, Crawford and Kalkaska Counties should never have filed that claim, MCR 2.114(D)(2), which,

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Mich 502 (1994). See also *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31 (2000). Due process is satisfied by giving the parties an opportunity to present their views before the Court rules, or by entertaining afterwards a motion for reconsideration. *Id.*, at 706. In this case, this Court brought up the potential issue of standing at oral argument and invited briefs from the parties

in turn, means that the Trial Court is entitled to sanctions.

The summary striking of the claim of fraud relating to the pension actuarial studies is a different matter, however. This Court's determination, as a matter of law, that the Trial Court did not have a duty to disclose, given their particulars, those studies which it did have was a matter of first impression. While that does not render inappropriate the summary resolution of the fraud claim, it does preclude the imposition of sanctions. *Neitzke, supra.* It is difficult to say that Crawford and Kalkaska Counties had no legitimate basis to conclude that they might prevail on the claim. The lack of duty was fairly apparent, but, until ruled on once, counsel cannot be criticized for trying. *Kitchen, supra,* at 662; and *Travelers Ins Co v U-Haul of Michigan, Inc,* 235 Mich App 273, 290 (1999). Hence, as to that fraud claim, but only that claim, there was no violation of MCR 2.114(D)(2).

Sanctions are also appropriate, however, for making claims against Otsego County based on the UBAA. That statute is unambiguous: actions, whether civil or criminal, alleging violations of the act can be brought only by the Attorney General or a pertinent prosecuting attorney, not by anyone else. The caselaw has long been equally plain. Therefore, counsel for Crawford and Kalkaska Counties should have known that their clients have no standing to allege that Otsego County violated the UBAA, making the allegation that it did another violation of MCR 2.114(D)(2). Sanctions necessarily follow because MCR 2.114(E) dictates that "[i]f a document is signed in violation of this rule, the Court, on motion of the party or on its own motion, *shall impose* ... an appropriate sanction ..." [emphasis added].

Whether sanctions should also be imposed for Crawford

and Kalkaska Counties' fraud allegation against Otsego County is something which cannot now be decided. Just because the allegations were withdrawn does not mean that they were known to be unsustainable when made. Sometimes, subsequent developments undermine what initially appeared to have significant merit. Hence, if Otsego County wishes to pursue sanctions for the fraud allegation, the record will need to be developed further. Exactly what will need to be presented, and the proper mechanism for doing so, can be addressed when this case is tried in mid-June. Subsequent proceedings can then occur.

(2)

The determination that sanctions must be imposed leaves two more decision to make: How much? and On whom are they to be imposed? Because sanctions cannot be punitive, MCR 2.114(E), the only amount which can be considered appropriate are the costs incurred by the Trial Court defending the fraud claims and the costs incurred by Otsego County defending the claims that it violated the UBAA. Accordingly, those parties' counsel are to report to this Court what portions of their fees are attributable to those endeavors. Itemized billings will need to be produced.

As to the second question, the pertinent rule provides some discretion. Sanctions can be imposed on "the person who signed it [the document which violated MCR 2.114(D)(2)], a represented party, or both, ..." In this particular case, sanctions should be imposed on Crawford and Kalkaska counties counsel, not on the counties. First of all, those counties are already obligated to pay the Trial Court's attorney fees in these cases. Therefore, at least with regard to sanctions awarded to the Trial Court, imposing them on the

other counties is tantamount to no sanction at all, for it imposes no additional burden.[10] Second, it was counsel who should have known that the law plainly precluded what was being alleged. Clients can genuinely plead ignorance of the law.

Conclusion

This opinion, this Court fully appreciates, needs another week of redrafting to read as well as it should and to be as precise as it should be. However, given its other responsibilities, and the need of the parties to know where they stand as trial looms and they prepare for it, this Court does not have the time to be that careful. It must be satisfied with the opinion as is and must keep in mind the admonition by Massachusetts Superior Court Judge Dimond to newcomers to the bench: "A trial judge is a short order cook, not a gourmet chef" That is the trial judge's lot. The *Judge's Book* (2d ed), pp 227-228.[11] While not haute cuisine, this opinion is passable to deal with the issues at hand.[12]

Dated: May 30, 2003. **/s/ Judge Dennis Kolenda**
Dennis C. Kolenda
Assigned Circuit Judge

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[10] If this Court's award of attorney fees to the Trial Court is reversed on appeal, this Court will reconsider imposing sanctions directly on Crawford and Kalkaska Counties.

[11] The cited book is a compendium of wisdom by numerous trial judges collected by the National Conference of State Trial Judges and the National Judicial College.

[12] An effectuating order accompanies this opinion.

STATE OF MICHIGAN
IN THE SUPREME COURT

46TH CIRCUIT TRIAL COURT
Plaintiff/Counter-Defendant/
Third-Party Defendant/Appellee

vs. Supreme Court Nos. 132986-8

CRAWFORD COUNTY
and CRAWFORD COUNTY BOARD OF COMMISSIONERS Court of Appeals Nos. 246823, 248593, 251390, and 252335

Defendants/Counter Plaintiffs/Third-Party Plaintiffs/Appellants, Crawford County Circuit Court No. 02-5951-CZ

vs.

OTSEGO COUNTY,
Third Party Defendant,

and

KALKASKA COUNTY,
Intervening Third Party Plaintiff
And Counter Defendant-Appellant /

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Submitted by:

HILDA R. GAGE (P13785)
1795 Alexander Drive
Bloomfield Hills, Michigan 48302
(248) 851-0771
Attorney for Amici Curiae Associations

The Michigan Judges Association, Michigan District Judges Association, and the Michigan Probate Judges Association (hereafter "the Associations") move pursuant to MCR 7.306(C), for leave to file a Brief as Amici Curiae advocating denial of the application for leave to appeal filed by Crawford and Kalkaska Counties in this matter. Copies of the Brief are submitted to the Court together with this motion.

In support of their motion, the Associations say:

The Associations represent the interests of all Michigan trial and Court of Appeals judges. They are, therefore, uniquely positioned to advise this Court of their members' legitimate and important concerns related to the instant application. These concerns go well beyond the narrow issue this case presents – whether under these unique circumstances the attorney fees and costs of litigation incurred by the 46th Circuit Trial Court must be paid by its

responsible funding units. Based on their understanding of the facts and history of this case, the Associations firmly believe that the fees at issue should be paid, and that the Counties' application should be denied. Their primary concern, however, is that this Court not adopt the rule advocated by Crawford and Kalkaska Counties: that Michigan trial courts should be able to pay their lawyers in funding disputes only if the courts eventually prevail. Such a ruling would severely undercut the courts' ability to retain counsel in order to have their interests effectively advocated. And, because attorney fees for other types of representation are part of a court's operational funding and subject to the standards articulated by this Court, adopting a "court must win" requirement in the funding context could eventually destroy the ability of trial courts to obtain needed representation in other contexts.

The Associations believe that their accompanying

Brief of Amici Curiae provides a discussion and perspective that will aid the Court in resolving this application.

WHEREFORE, the Associations respectfully request the Court to grant their motion and to accept for filing their accompanying Brief as Amici Curiae.

Respectfully submitted,

By: *Hilda R. Gage*
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Attorney for Amici Curiae Associations
Dated: February 12, 2007

STATE OF MICHIGAN
IN THE SUPREME COURT

46TH CIRCUIT TRIAL COURT
Plaintiff/Counter-Defendant/
Third-Party Defendant/Appellee

vs. Supreme Court Nos. 132986-8

CRAWFORD COUNTY
and CRAWFORD COUNTY BOARD OF COMMISSIONERS Court of Appeals Nos. 246823, 248593, 251390, and 252335

Defendants/Counter Plaintiffs/Third-Party Plaintiffs/Appellants, Crawford County Circuit Court No. 02-5951-CZ

vs.

OTSEGO COUNTY,
Third Party Defendant,

and

KALKASKA COUNTY,
Intervening Third Party Plaintiff
And Counter Defendant-Appellant
_____/

NOTICE OF HEARING

TO: All Counsel of Record

PLEASE TAKE NOTICE that pursuant to MCR 7.313(A), the accompanying Motion For Leave To File Brief Of Amici

Curiae will be presented to the Michigan Supreme Court

on Tuesday, February 20, 2007.

Respectfully submitted,

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Dated: February 12, 2007

Michigan Supreme Court Lansing, Michigan

OPINION

Chief Justice
Clifford W. Taylor
Justices
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman

FILED JULY 28, 2006

46TH CIRCUIT TRIAL COURT,

Plaintiff, Counter-Defendant,
Third-Party Plaintiff-Appellee,

V No. 128878

COUNTY OF CRAWFORD AND CRAWFORD COUNTY BOARD OF COMMISSIONERS,

Defendants, Counter-Plaintiffs,
Third-Party Plaintiffs-Appellants,

and

COUNTY OF KALKASKA,

Intervening Defendant, Counter-Plaintiff,
Third-Party Plaintiff-Appellant

and

COUNTY OF OTSEGO,

Third-Party Defendant

BEFORE THE ENTIRE BENCH

MARKMAN, J.

We granted leave to appeal to consider this funding dispute between the 46th Circuit Trial Court (hereafter the Trial Court) and two of its three county funding units. This case involves a conflict between the legislative branch's exercise of the "legislative power" to appropriate and to tax, and the judicial branch's inherent power to compel sufficient appropriations to allow the judiciary to carry out its essential judicial functions. Specifically, the Trial Court seeks to compel the defendant counties to appropriate funding for the enhanced pension and retiree health care plans it deems necessary to recruit and retain adequate staff to allow it to carry out its essential judicial functions. The circuit judge found in favor of the Trial Court, holding that the benefits were "reasonable and necessary" to the court's ability to perform its constitutional responsibilities and that the counties created for themselves a contractual obligation to appropriate funds for the enhanced pension and retiree health care plans. The Court of Appeals affirmed. Because we conclude that such benefits were not "reasonable and necessary" to the "serviceability" of the court, and because we conclude that the defendant counties were not contractually obligated to appropriate funds for the enhanced benefits plan sought by the Trial Court, we reverse the judgment of the Court of Appeals and remand this case to the circuit judge for entry of a judgment in favor of defendants.

I. FACTS AND PROCEDURAL HISTORY

The Trial Court's predecessor, the 46th Circuit Court, was the circuit court servicing Otsego, Crawford, and Kalkaska counties. Pursuant to Administrative

Order No. 1996-9, 451 Mich civ, the 46th Circuit Court, along with the district and probate courts within these counties,[1] became part of a demonstration project designed to evaluate the feasibility of consolidating various court functions into a single entity known as the 46th Circuit Trial Court.[2] The chief judge of the 46th Circuit Court was appointed the Trial Court's chief judge (hereafter Chief Judge), and Otsego County was designated as the Trial Court's control unit.

In order to facilitate this consolidation, the Trial Court began a large-scale administrative reorganization for the purpose of standardizing wages, benefits, and personnel policies. During this reorganization in the summer of 2000, the Chief Judge requested that his employees switch to a less-favorable prescription drug and health insurance plan and that they relinquish longevity pay. In return for this concession, the Chief Judge agreed to seek an enhanced employee pension plan

1 The other courts included in the demonstration project were the 83rd District Court, to the extent it served Crawford County; the 87th District Court, to the extent it served Kalkaska and Otsego counties; the Crawford County Probate Court; the Kalkaska County Probate Court; and the Otsego County Probate Court.

2 The demonstration project was originally scheduled to last only two years and encompassed six project courts: Barry County, Berrien County, Isabella County, Lake County, Washtenaw County, and the 46th Circuit Court. However, pursuant to Administrative Order No. 1997-12, 456 Mich clxxxi, the project was extended "until further order of the [Supreme] Court." Iron County was added as a seventh demonstration project court in 1999. In 2002, the Legislature

enacted MCL 600.40 1 *et seq.*, which permits a county or judicial circuit to consolidate all or part of its operations subject to the approval of this Court. In January 2003, this Court adopted Administrative Order No. 2003-1, 467 Mich cix, which provides in part that "[s]ubject to approval of the Supreme Court, a plan of concurrent jurisdiction may be adopted by a majority vote of judges of the participating trial courts."

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and a new retiree health care plan funded by the counties. The Chief Judge presented his enhanced benefits plan, first, to the Tri-County Committee, a nonbinding committee that consisted of individuals representing each county, and subsequently to each county's board of commissioners. The boards of commissioners for Otsego and Kalkaska counties passed resolutions agreeing to implement the enhanced benefits plan. On August 29, 2000, the Crawford County Board of Commissioners passed the following resolution:

> MOTION by Hanson, seconded by Beardslee, to authorize the County [to] pay 24% of $50,000 ($12,000) for the year 2000 and that payment will increase at 4% per year until 2017, and at that time will pay an estimated $94,649 and that the Blue Cross/Blue Shield medical supplement payment per individual would be capped at [sic] the year 2000 at $4,087.00 [and] would increase at 4% per year until 2017 for an employee to be eligible for $7,654.00 per year.
> MOTION by Wieland, seconded by Hanson, to request the [Trial] Court not implement the MERS [Municipal Employees' Retirement System] B-4 upgrade at this time, but recognize the change in the 2001/2002 budget cycle.

That same afternoon, the Chief Judge informed the Chairwoman of the Crawford board that there had been an error in calculating the annual premium for the first year of the retiree health care plan and that the $4,087 figure was too low. The Chief Judge and the Chairwoman of the board subsequently agreed that the sum of $5,763 should be substituted as the correct first-year premium. However, the Crawford board never amended the resolution to reflect this new figure.

Following the vote in Crawford County, the Chief Judge prepared a contract memorializing the agreement. Although the contract was signed by representatives from Kalkaska and Otsego counties, Crawford County refused to sign the contract because of the board's concern regarding the prospect of a sizeable unfunded liability.[3] Shortly thereafter, on December 4, 2000, the Chief Judge implemented both the enhanced benefits plan and the employee concessions by order. Initially, Crawford County alone refused to appropriate its share of the costs of the enhanced benefits plan for fiscal years 2001-2003. However, approximately one year after the implementation order was entered, the Kalkaska County Board of Commissioners rescinded its resolution approving the enhanced benefits plan primarily on the basis of the concerns raised by Crawford County.[4] Otsego County proceeded to fund the entire cost of the enhanced benefits plan without reimbursement from the other funding units.

After unsuccessful attempts to settle the dispute, the Chief Judge communicated the notice required by Administrative Order No. 1998-5 § III(1), 459 Mich clxxvi, of the Trial Court's intention to sue Crawford County. After the required 30-day

waiting period expired, the Trial Court brought this action to compel funding, claiming both that Crawford County was contractually obligated to fund the enhanced benefits and that it had failed to provide sufficient funds to Crawford County Commissioner Scott Hansen also noted that the board rejected the contract because it was "not what [the board] approved [on August 29, 2000.]" Defendant's appendix at 435a.

4 Kalkaska County paid its full share of the Trial Court's budget in both 2001 and 2002. It failed to appropriate funds for its share of the enhanced benefits plan for fiscal year 2003.

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allow the court to operate. Specifically, the Trial Court argued that, absent the enhanced benefits, the morale of its employees would decline, leading to lower productivity and, as a result, the court would be unable to function. The Trial Court further argued that it could not generate sufficient savings in its budget to pay for the enhanced benefits and that any staff cuts would prevent the court from operating at a serviceable level. Crawford County denied the allegations and asserted in a counterclaim that the Trial Court had exceeded its authority when it implemented the enhanced pension and retiree health care plans and that the Trial Court had fraudulently misrepresented the costs of the latter. Kalkaska County moved to intervene on behalf of Crawford County. In a separate action, Crawford and Kalkaska counties sued Otsego County, claiming that Otsego County had improperly implemented the enhanced pension and retiree health care plans and had colluded with the Trial Court to withhold information about the cost of the pension increase. The cases were consolidated and the State Court Administrator assigned a circuit judge from outside the affected counties to preside over these cases.

The circuit judge eventually found that the Trial Court's requested budget, specifically the requested appropriation for the enhanced benefits plan, was "reasonable and necessary" to the court's ability to perform its essential functions. The requested appropriation was "reasonable" because it was not "excessive" and was "comparable to what other courts spend on like activities." The requested appropriation was also "necessary" because it had been "convincingly" proved that loss of the benefits plan would destroy employee morale to the point where the court could no longer function. The circuit judge also found that the August 29, 2000, resolution created an explicit contract with the Trial Court to implement the enhanced benefits plan. In a published opinion, 266 Mich App 150; 702 NW2d 588 (2005), the Court of Appeals affirmed.[5]

This Court granted the defendant counties' application for leave to appeal, limited to the questions: (1) whether the appropriations sought for the enhanced benefits plan were "reasonable and necessary to achieve the court's constitutional and statutory responsibilities"; (2) whether the defendant counties were contractually obligated to fund the enhanced benefits plan at the level requested by the Trial Court; and (3) whether there was evidence to support the conclusion that the level of funding offered by the counties was insufficient to allow the court to fulfill its essential functions. 474 Mich 986 (2005).[6]

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5 Judge Zahra, concurring in part and dissenting in part, opined that defendants had a preexisting statutory and constitutional duty to provide the Trial Court with sufficient funding to carry out its constitutional responsibilities. Because of this, the Trial Court's contract claim failed for lack of consideration. In

addition, he observed that there was no statutory or other authority underlying the contract claims between courts and their funding units.

6 In addition to affirming the judgment of the circuit judge on the Trial Court's contractual and "inherent power" claims, the Court of Appeals resolved a number of other issues, including the Trial Court's entitlement to attorney fees. Applications for leave to appeal from those matters have been held in abeyance by this Court for resolution of the instant case. *Crawford Co v Otsego Co*, 707 NW2d 350 (2005); *46th Circuit Trial Court v Crawford Co*, 707 NW2d 351 (2005); *Crawford Co v Otsego Co*, 707 NW2d 351 (2005); *46th Circuit Trial Court v Crawford Co*, 707 NW2d 594 (2005).

II. STANDARD OF REVIEW

Whether county funding of local court operations satisfies constitutional requirements presents a constitutional question that this Court reviews de novo. *DeRose v DeRose*, 469 Mich 320, 326; 666 NW2d 636 (2003). We review for clear error the factual findings underlying the circuit judge's determination of whether the requested appropriation was "reasonable and necessary." MCR 2.613(C).

Issues of contract interpretation are questions of law that we review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). We review for clear error the findings of fact underlying the circuit judge's determination whether a valid contract was formed. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). A finding is "clearly erroneous" if, "the

reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made." *Bynum v EASB Group, Inc*, 467 Mich 280; 285; 651 NW2d 383 (2002). The interpretation of a county resolution, as with the interpretation of a statute, is a question of law, which we review de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

III. ANALYSIS

A. "INHERENT POWER"

The judiciary's "inherent power" to compel funding is an extraordinary power and is derived from the separation of governmental powers set forth principally in Const 1963, arts 4-6, relating to the authorities of the legislative, executive, and judicial branches of government, and Const 1963, art 3, § 2, which provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

The framers of Michigan's Constitution understood well the importance of separating the powers of government. The doctrine of separation of powers rests on the notion that the accumulation of too much power in one governmental entity presents a threat to liberty. James Madison expressed this sentiment more than 200 years ago when he wrote, "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a

few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist, No. 47. Thus, governmental power was separated-- with the Legislature exercising the "legislative power," Const 1963, art 4, § 1; the Governor exercising the "executive power," Const 1963, art 5, § 1; and the judiciary exercising the "judicial power," Const 1963, art 6, § 1.

The "legislative power" has been defined as the power "to regulate public concerns, and to make law for the benefit and welfare of the state." Cooley, Treatise on the Constitutional Limitations (Little, Brown & Co, 1886), at 92. Perhaps the most fundamental aspect of the "legislative power," authorized by the opening sentence of US Const, art I, § 8, which defines the powers of the legislative branch, is the power to tax and to appropriate for specified purposes. See also Const 1963, art 4. The power to tax defines the extent to which economic resources will be apportioned between the people and their government, while the power to appropriate defines the priorities of government. Partly in recognition of the enormity of these powers, the framers of our constitutions determined that the branch of government to exercise these powers should be that branch which is closest to, and most representative of, the people.

This is true for other reasons as well. In contrast with the judiciary, for example, the legislature is not restricted in the range of testimony that it may hear as a prelude to enacting public policy, it is better positioned to accommodate competing policy priorities, it is better equipped to effect compromise positions after negotiation and bargaining, it is more regularly and directly accountable to the people, and its membership is more broadly representative of society and

its various interests.

However, just as it is implicit in the separation of powers that each branch of government is empowered to carry out the entirety of its constitutional powers, and only these powers, it is also implicit that each branch must be allowed adequate resources to carry out its powers. Although the allocation of resources through the appropriations and taxing authorities lies at the heart of the *legislative* power, and thus belongs to the legislative branch, in those rare instances in which the legislature's allocation of resources impacts the ability of the judicial branch to carry out its constitutional responsibilities, what is otherwise exclusively a part of the legislative power becomes, to that extent, a part of the judicial power. As observed by James Madison:

> [M]embers of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the Legislature in this particular, their independence in every other would be merely nominal. [Madison, The Federalist, No. 51.]
>
> As the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence over the pecuniary rewards of those who will fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former. [Madison, The Federalist, No. 48.]

In order for the judicial branch to carry out its

constitutional responsibilities as envisioned by Const 1963, art 3, § 2, the judiciary cannot be totally beholden to legislative determinations regarding its budgets. While the people of this state have the right to appropriations and taxing decisions being made by their elected representatives in the legislative branch, they also have the right to a judiciary that is funded sufficiently to carry out its constitutional responsibilities.

Thus, the judiciary's "inherent power" to compel appropriations sufficient to enable it to carry out its constitutional responsibilities is a function of the separation of powers provided for in the Michigan Constitution. The "inherent power" does not constitute an exception to the separation of powers; rather, it is integral to the separation of powers itself. What *is* exceptional about the judiciary's "inherent power" is its distinctiveness from more traditional exercises of the judicial power, involving as it does determinations that directly implicate the appropriations power.

However, in order to accommodate this distinctive, and extraordinary, judicial power with the normal primacy of the legislative branch in determining levels of appropriations, the "inherent power" has always been sharply circumscribed. The "inherent power" contemplates only the power, when an impasse has arisen between the legislative and judicial branches, to determine levels of appropriation that are "reasonable and necessary" to enable the judiciary to carry out its constitutional responsibilities. However, levels of appropriation that are *optimally* required for the judiciary remain always determinations within the legislative power.

This Court has recognized the inherent powers

doctrine for over 120 years. In *Stowell v Jackson Co Bd of Supervisors*, 57 Mich 31; 23 NW 557 (1885), the Jackson Circuit Court deemed it necessary to house jurors in a hotel during the course of a murder trial. After the trial was over, however, the board of supervisors refused to pay for the hotel charges. This Court undertook its analysis by noting that the trial court has the power and discretion to determine whether a jury needs to be secluded. We reasoned that, because the trial court has the power to sequester the jury, it must also have the authority to bind the county funding unit to pay for that sequestration. *Id.* To hold otherwise "would put it in the power of a board of supervisors to prevent courts from exercising their proper functions." *Id.* at 34-35.[7] Therefore, the Court concluded that, while the Legislature controls the power of the purse, "the inherent power and duty of courts to exercise their functions must authorize [payment for actions such as the sequestration] as becomes expedient in the course of judicial business." *Id.* at 34.

That the judiciary's inherent power to compel funding also extends to the appropriation of funds for employee salaries was expressed by Justice Black in his dissenting opinion in *Wayne Circuit Judges v Wayne Co*, 383 Mich 10; 172 NW2d 436 (1969) (*Wayne Co I*). As he explained, the essence of the "inherent power" doctrine is "that the constitutionally-assigned duty of a court such as ours automatically carries with it the power and responsibility of making [continually] sure that this 'one court of justice' (Const 1963, art 6, § 1) functions serviceably as a co-equal branch of Michigan's government . . . ." *Id.* at 33. To determine whether a court can function "serviceably," Justice Black indicated that the Court must first determine whether the appropriation sought by the court is necessary to address a "critical judicial need[]" and,

if it is, then determine whether the amount requested is reasonable "to meet the urgency of the situation." *Id.* at 34.

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7 Importantly, this Court noted that "[i]t would be very unsafe, and might imperil the validity of a conviction, if the care of the jury should be left to the discretion of an officer." *Id.* at 32-33. In other words, the power to sequester a jury, and the corresponding power to demand payment from the funding authority to pay for that sequestration, plays a vital role in a court's ability to conduct criminal trials and, therefore, to exercise its constitutionally mandated responsibilities.

Less than two years later, this Court expressly adopted Justice Black's dissenting statement in *Wayne Co I. Wayne Circuit Judges v Wayne Co (On Rehearing)*, 386 Mich 1, 8-9; 190 NW2d 228 (1971) (*Wayne Co II*). In so holding, this Court concluded that "the Judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government." [*Id.* at 9, quoting *Commonwealth, ex rel Carroll v Tate*, 442 Pa 45, 52; 274 A2d 193 (1971) (emphasis in original).]

We further reasoned that the "inherent powers" doctrine is rooted in the constitutional command that the judicial power of this state is vested exclusively in "one court of justice . . . ." Const 1963, art 6, § 1. "The [L]egislature may not abolish that court. Neither is it permissible for the [L]egislature to render the court inoperative by refusing

financial support." *Wayne Co II, supra* at 14 (opinion by T.E. Brennan, J.). Thus, the judiciary has the inherent power to seek the funding necessary to sustain its ability to function serviceably in carrying out its constitutional responsibilities. *Wayne Co I, supra* (Black, J., dissenting). On that basis, this Court held that Wayne County must appropriate funds for those positions "established by the law or needed in the operation of the circuit court . . . ." *Id.* at 33.

Subsequent decisions make clear that the judiciary's inherent power to compel funding is limited to those appropriations required to meet "critical judicial needs." *Wayne Co Prosecutor v Wayne Co Bd of Comm 'rs*, 93 Mich App 114; 286 NW2d 62 (1979). In *Wayne Co Prosecutor*, several county executive officers sought an injunction against budget cuts proposed by the defendant county. The Court of Appeals began its analysis by noting that, as is the case with the judiciary, a funding authority is obligated to budget sums sufficient to allow executive officers to carry out their mandated duties and obligations. However, the Court of Appeals also recognized that the courts must not involve themselves with the "truly discretionary appropriations decisions of a county board . . . ." *Id.* at 122. To balance these concerns, the Court of Appeals held that

> "serviceability" [is] the standard to be applied in determining whether the board of commissioners has unlawfully underfunded the county executive officers so that they are unable to fulfill their statutory obligations. Serviceability must be defined in the context of Justice Black's opinion, *i.e.* "urgent", "extreme", "critical", and "vital" needs. A serviceable level of funding is the minimum budgetary appropriation at which statutorily

> mandated functions can be fulfilled. A serviceable level is not met when the failure to fund eliminates the function or creates an emergency immediately threatening the existence of the function. A serviceable level is not the optimal level. A function funded at a serviceable level will be carried out in a barely adequate manner, but it will be carried out. A function funded below a serviceable level, however, will not be fulfilled as required by statute. [*Id.* at 124, citing *Wayne Co I* (Black, J., dissenting).]

This Court reiterated the limited nature of the "inherent power" doctrine in *Employees & Judge of the Second Judicial Dist Court v Hillsdale Co*, 423 Mich 705, 717; 378 NW2d 744 (1985). In *Hillsdale Co*, this Court addressed the issue of whether a funding unit could be compelled to appropriate funds for salary increases that were neither approved by it nor "proven to be necessary to maintain a statutory function of the court or to provide for the overall administration of justice."[8] This Court began its analysis by noting that "[e]ach branch of government has inherent power to preserve its constitutional authority." *Id.* On the other hand, "an indispensable ingredient of the concept of coequal branches of government is that 'each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.'" *Id.*, quoting *United States v Will*, 449 US 200, 228; 101 S Ct 471; 66 L Ed 2d 392 (1980). Thus, a lawsuit to compel funding under the "inherent powers" doctrine is limited to circumstances where "the overall operation of the court, or a constitutional function is in jeopardy because of the actions taken by the funding unit." *Hillsdale Co, supra* at 717-719. This Court noted that there was no dispute that, as found by the trial court, the plaintiff trial court was functioning at a level

"'satisfactory to all.'" *Id.* at 722. Because there was no claim that the plaintiff trial court could not exercise a statutory or constitutional function, there was no basis to resolve "the issue of when and under what standards the judiciary may compel expenditures beyond those appropriated . . . ." *Id.* at 722.

Justice Riley wrote separately for the purpose of "set[ting] forth principled procedures to resolve, as fairly and expeditiously as possible, those conflicts which necessarily arise when the legislative branch refuses to approve funding

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8 In the companion case, *Cheboygan Co Bd of Comm 'rs v Cheboygan Circuit Judge*, the Cheboygan Circuit Court sought to compel funding for a part-time mediation clerk. However, at issue in *Cheboygan Co* was the question of whether a trial court may employ an administrative order to compel funding in excess of the court's appropriation. This Court concluded that the use of an administrative order was inappropriate under MCR 8.112(B).

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requested by the judicial branch for reasonable and necessary court operations." *Id.* at 728 (Riley, J., dissenting). Specifically, Justice Riley responded to the majority's failure to articulate a standard against which the court's inherent power to compel funding is to be measured. Justice Riley began her analysis by recognizing that the "inherent powers" doctrine was designed to preserve the balance of power between the three branches, not to upset that balance in favor of judicial supremacy. In order to protect both the county board's power over county funds and the court's ability to

exercise the judicial power, Justice Riley concluded that "the judiciary must bear the burden of articulating the constitutional bases for asserting [the inherent power]" and that it must invoke the authority "with caution, in a manner that will not place in jeopardy the public's confidence in the integrity of the judiciary." *Id.* at 740. Specifically, Justice Riley opined that the court seeking to compel funding must "set forth specific findings of fact, identifying those judicial functions that will be in jeopardy if the appropriation requested is denied, and conclusions of law indicating why the function is required by the constitution." *Id.* at 744.

We agree with Justice Riley that invocation of the "inherent power" of the judiciary will least disrupt the constitutional balance between the judicial and legislative branches where procedures of the sort she proposes are followed. Accordingly, we adopt that portion of Justice Riley's opinion that articulates the *procedure* that trial courts must follow in pursuit of their "inherent power."

In litigation to compel funding, the plaintiff court must prove by clear and convincing evidence that the requested funding is both "reasonable and necessary." *Branch Co Bd of Comm 'rs v Service Employees Int'l Union*, 168 Mich App 340, 351; 423 NW2d 658 (1988); *17th Dist Probate Court v Gladwin Co Bd of Comm'rs*, 155 Mich App 433, 453; 401 NW2d 50 (1986). The plaintiff court seeking to compel funding must demonstrate that "the overall operation of the court, or a constitutional function is in jeopardy because of the actions taken by the funding unit." *Hillsdale Co, supra* at 717-719. Finally, a court deciding an inherent powers claim must specifically set forth findings of fact identifying specifically those judicial functions that will be in jeopardy if the appropriation sought is denied, and

conclusions of law indicating why such functions implicate the constitutional responsibilities of the judiciary.

B. CLEAR & CONVINCING EVIDENCE

Because the Trial Court here has failed to demonstrate by clear and convincing evidence that the enhanced benefits plan is both "reasonable and necessary" to allow that court to function serviceably in carrying out its constitutional responsibilities, we conclude that the circuit judge and the Court of Appeals clearly erred in holding that the Trial Court could compel appropriations for such plan. An appropriation is "necessary" when it is sought by the court to address a "critical judicial need[]" that affects that court's ability to function "serviceably" in carrying out its constitutional responsibilities. *Wayne Co I, supra* at 3 3-34. A "serviceable" level of funding is "the minimum budgetary appropriation at which statutorily mandated functions can be fulfilled." *Wayne Co Prosecutor, supra* at 124. "A function funded at a serviceable level will be carried out in a barely adequate manner, but it will be carried out." *Id.*

To justify the conclusion that the enhanced benefits plan was both "reasonable and necessary," the circuit judge and the Court of Appeals both relied on the claims of the Chief Judge that failure to provide the enhanced benefits would negatively affect employee morale. However, we believe that the Trial Court failed to demonstrate that there existed a morale problem that impaired the court's ability to function "serviceably" in carrying out its constitutional responsibilities. *Wayne Co II.*

Specifically, the Chief Judge testified that there "probably" would be people who would quit their jobs and

that the Trial Court would have trouble finding new employees. However, the Chief Judge's opinion was utterly unsupported. The Trial Court failed to demonstrate that even *one person* had either left its employ or was planning to leave its employ as a result of the alleged inadequacy of the preexisting benefits plan.[9] Further, the Trial Court was unable

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9 The dissent argues that the testimony of Rudi Edel, the Trial Court's administrator, that "six [employees] left for wages and benefits" supports the circuit judge's conclusion that the enhanced benefits plan was "reasonable." *Post* at 9. However, when Edel was asked, "How many [of the six employees] told you that the reason they were leaving was for better retirement plans?" he could not identify even one such person. Defendants' appendix at 1468a. Further, one of the Trial Court's judges, Judge Dennis Murphy, testified at a deposition that he had never heard either directly or indirectly of any employee who had quit or
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to identify even *one person* who had refused an offer of employment because the preexisting benefits plan was inadequate.

Even assuming for the sake of argument that there was sufficient evidence to support the Chief Judge's claim of declining morale, a claimed effect on employee morale, by itself, is not sufficient to invoke the "inherent powers" doctrine. The circuit judge and the Court of Appeals based their holdings on *Gladwin Co.* In *Gladwin Co,* the defendant

funding unit determined compensation for court employees without taking into account the training, responsibilities, and duties of each position. As a result, for example, a probation officer was paid the same amount as a register, and a newly hired juvenile probation officer was paid the same wage as the defendant county's general clerical employees. The Court of Appeals concluded that, because of the morale problems caused by this "unfair and inequitable" pay scheme, the additional appropriations for salaries for the disputed positions were "reasonable and necessary." *Id.* at 454-455.

However, we note that declining employee morale alone was *not* the determinative factor in *Gladwin Co.* As noted by the Court of Appeals, the irrational pay scheme instituted by the funding unit had caused the court to fill the position of juvenile probation officer six times in less than 12 years. Further, the court had considerable difficulty attracting competent employees for the position,

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contemplated quitting their job in the event they did not receive a better pension plan. *Id.* at 1225a.

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as demonstrated by the two occasions on which the position had gone unfilled for more than three months each. In other words, the irrational pay scheme had not just caused the court's employees to become "demoralized," but such morale problems had specifically manifested themselves in the court's inability to hire and retain probation officers. Accordingly, we conclude that a claim that court employees suffer from a loss of morale is insufficient to support an inherent powers claim, absent some showing that the

claimed morale problems have demonstrably caused court employees to be unable to carry out their constitutional responsibilities.

Further, there is no evidence here that the productivity of court employees has diminished to such an extent that the court cannot carry out its constitutional responsibilities, or indeed that it has diminished to any extent. Rudi Edel, administrator of the Trial Court, testified that the court was not suffering from any speedy-trial problems either before or after the current funding controversy. Defendants' appendix at 1452a-1453a.[10] In fact, the court has continued to process its civil and criminal dockets adequately.[11] *Id.* Moreover, an audit

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10 Edel further acknowledged that, with current staffing levels, the Trial Court is "getting our work done, our *mandated and reasonable and necessary functions.*" Plaintiff's appendix at 700b (emphasis supplied).

11 Edel testified that the Trial Court was not complying with at least one administrative order of this Court, three or four federal statutes, and three or four state statutes. Trial Transcript Vol 1 at 284. According to the dissent, this evidence supports the circuit judge's findings of fact. *Post* at 10. However, there was no evidence to suggest that the Trial Court was fulfilling these requirements

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conducted by the State Court Administrative Office determined that the Trial Court's quality control is "excellent." Thus, unlike in *Gladwin Co*, there is no evidence that the claimed morale problems rendered the court

incapable of carrying out any of its essential judicial functions. Even if we accept the Chief Judge's unsupported statements that some court employees may have "one eye on another job" and will be "unhappy," the Trial Court has failed to demonstrate that those employees are unable to perform their jobs. In fact, the Trial Court's own expert testified that the employees were functioning "within the ranges that are expected to be there by the State." Plaintiff's appendix at 852b.[12] Further, the

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before the instant controversy. Moreover, the requested appropriation is for *retiree* benefits and would not result in a single additional person being hired. The dissent opines that "people *do* choose jobs on the basis of the adequacy or inadequacy of retiree benefits." *Post* at 11. Doubtless, employees rely on any number of factors in choosing jobs. While retirement benefits undeniably are within a broad range of factors an employee considers in deciding whether to accept an offer of employment, there is no demonstrated impact in this case of the absence of *additional* such benefits upon the Trial Court's ability to fulfill its constitutional and statutory obligations. Accordingly, the appropriation at issue is not "reasonable and necessary" in the sense that the judicial branch can impose this appropriation upon unwilling counties as part of its inherent powers.

12 The expert, Ross Childs, who is the county executive of Grand Traverse County, testified:

I looked at the budgets that were prepared. I read some of the documents. I looked at it and made an assessment as to whether there was what I thought "fat" in the budget. I didn't see a lot of fat in the budget. I looked at the caseloads and I went through the State Court Administrator's Officer

and looked at the reports that were there, the assignments and the staff and the caseload per staff for caseworkers in the Friend of the Court and probation officers and so
(continued...)

Chief Judge admitted that his staff was "soldiering on" even in light of the potential loss of the enhanced benefits plan. In other words, even assuming that the employees were dissatisfied or unhappy, the Trial Court was, in fact, *able* to function as a court even without the enhanced benefits plan. The question in an inherent powers case is not whether all court employees are "satisfied" or "happy," but, rather, whether they are able to perform their jobs in a manner that allows the Trial Court to function "serviceably" in carrying out its constitutional responsibilities.

Also, the Chief Judge admitted at trial that he specifically asked for "the best [pension] plan that's available." Trial transcript at 342. In other words, the requested appropriation, by its own terms, comprises the *maximum* necessary to improve employee morale, not what was "reasonable and necessary" to ensure that its employees could carry out the Trial Court's constitutional responsibilities.

Finally, any claimed morale problems that did exist among the Trial Court's employees seem predicated upon the Chief Judge's own unilateral promise to provide the enhanced benefits.[13] To this extent, the Trial Court is seeking to

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on were consistent; that they are well in -- within the ranges that are expected to be there by the State. I didn't find the fat in the budget. *[Id.]*
13 The dissent argues that it was the counties' decision to renege on the agreement, and not the Chief Judge's unilateral promises, that created the alleged morale problems. *Post* at 13-15. However, when the Chief Judge implemented the benefits plan by order in December 2000, he did so knowing that Crawford
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require the counties to pay for a problem that it has arguably created. It cannot be that a court can claim a "morale problem" where the alleged problem is a function of unwarranted promises of benefit increases that it has made to its employees. Under the circuit judge's reasoning in this regard, any court could seek to invoke its "inherent power" to compel its funding unit to make an appropriation beyond what it was prepared to make-- no matter how unreasonable or unnecessary-- solely on the basis of such a unilateral promise. To adopt such a position would not maintain the balance of powers between the legislative and judicial branches– as the "inherent powers" doctrine is designed to do– but would instead impose a doctrine of judicial supremacy in favor of the branch of government *least* suited to make policy-driven appropriations and taxing decisions.[14]

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County was unwilling to go along. This was established in a

September 29, 2000, letter by the Chief Judge to the county boards of commissioners, which stated that "should the contract fail to be executed prior to the year's end, issues regarding wages and longevity bonuses will have to be revisited." Defendant's appendix at 1695a. This was also established in a November 2000 letter by the Chief Judge to the county boards of commissioners, which recognized that "Crawford County is still considering that matter" and that "we must conclude our arrangement early in the month of December." Defendants' appendix at 414a-415a. Had Crawford County already agreed to the purposed benefits, as the dissent asserts, Crawford County would not have needed to "consider" anything and there would have been no need to "revisit" the wage and longevity pay concessions made by the Trial Court's employees.

14 Indeed, we note that Kalkaska County's request for an additional one mill of taxation to fund the Trial Court's retirement expenses was overwhelmingly defeated by the voters in that county, with 4,415 votes against the proposal to 568 votes in favor of the proposal. Defendants' appendix at 1371a.

In light of insufficient evidence that the appropriation for enhanced benefits sought by the Trial Court was "necessary" to the ability of the court to function "serviceably" in carrying out its constitutional responsibilities, the Trial Court has failed to establish a right to compel funding from the defendants under the "inherent powers" doctrine.[15] Therefore, any increased benefits for the employees of the Trial Court must come through the ordinary processes of negotiation and bargaining between the Trial Court and the representatives of the people on the Crawford, Kalkaska, and

Otsego county boards of commissioners; such benefits are not properly obtained by judicial order.

C. CONTRACT CLAIMS

Although we conclude that the requested appropriation was not "necessary" to allow the Trial Court to function "serviceably" in carrying out its constitutional responsibilities, we must also address the lower courts' alternative conclusion that defendants are contractually obligated to appropriate funding for the enhanced benefits plan.

Administrative Order No. 1998-5, 459 Mich clxxvi-clxxvii, provides in pertinent part:

> A court must submit its proposed and appropriated annual budget and subsequent modifications to the State Court Administrator at the time of submission to or receipt from the local funding unit or units. The budget submitted must be in conformity

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15 Because we conclude that the enhanced benefits were not "necessary," we need not determine whether those benefits were a reasonable means "to meet the urgency of the situation." *Wayne Co I, supra* at 33-34 (Black, J., dissenting).

> with a uniform chart of accounts. If the local funding unit requests that a proposed budget be submitted in line-item detail, the chief judge must comply with the request. . . . A chief judge may

> not enter into a multiple-year commitment concerning any personnel economic issue unless: (1) the funding unit agrees, or (2) the agreement does not exceed the percentage increase or the duration of a multiple-year contract that the funding unit has negotiated for its employees. . . .
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> * * *
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> If, after the local funding unit has made its appropriations, a court concludes that the funds provided for its operations by its local funding unit are insufficient to enable the court to properly perform its duties and that legal action is necessary, the procedures set forth in this order must be followed.

Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "The words of a statute provide 'the most reliable evidence of its intent . . . .'" *Id.*, quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). This Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sun Valley, supra* at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley, supra* at 237. "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id.* at 236. "[T]he same principles of statutory construction apply in determining [this Court's] intent in promulgating rules of procedure . . . ." *People v Davis*, 181 Mich App 354, 356; 448 NW2d 842

(1989).

As noted above, the Constitution imposes a duty on a county board of commissioners to appropriate funds "reasonable and necessary" to allow the court to function serviceably in carrying out its constitutional responsibilities. Once the board of commissioners has made a funding determination, AO 1998-5 imposes a duty on the court not to exceed either the total amount appropriated by the board or the amount specified in a line-item appropriation. Where the total or line-item appropriation is insufficient, the court must go back to the county board of commissioners to seek an additional appropriation. A trial court may only challenge a funding decision made by a county board if "the funds provided for its operations . . . are insufficient to enable the court to properly perform its duties . . . ." *Id.* Thus, the county board's appropriations to the judiciary can be challenged either through the political process, i.e., by seeking an additional appropriation from the board, or through the legal process, when the board has failed to appropriate enough money to allow the court to function serviceably in carrying out its constitutional responsibilities. However, if it decides not to exercise either of these two options, a trial court must live within the budget appropriated by its board.

The circuit judge and the Court of Appeals majority concluded that a county board could also be bound by contract to appropriate a certain level of funding to its trial courts. However, the county board has a preexisting constitutional duty to appropriate a serviceable level of funding to its trial courts. An essential element in a contract claim is legal consideration. *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000). "Under the preexisting duty rule, it

is well settled that doing what one is legally bound to do is not consideration for a new promise." *Id.* at 740-741. Such a contract would appear to fail for lack of consideration. *Puett v Walker*, 332 Mich 117, 122; 50 NW2d 740 (1952). In other words, because the county board has a preexisting duty to appropriate a serviceable level of funding to its court, a county cannot be compelled under contract law to appropriate "reasonable and necessary" funds to enable the court to function serviceably in carrying out its constitutional responsibilities.

Moreover, there was no "meeting of the minds" between the Trial Court and Crawford County because the terms of the retiree health care plan were altered after the Crawford County resolution was passed. *West Bloomfield Hosp v Certificate of Need Bd (On Remand)*, 223 Mich App 507, 519; 567 NW2d 1 (1997). Here, the resolution passed by Crawford County authorized a $4,087 cap on payments made in the first year of the benefit program. However, the actual first year cap was $5,763. The board never amended the resolution to reflect that new figure, and never voted on any amended resolution. The circuit judge and the Court of Appeals majority held that the resolution constituted a valid acceptance of the Trial Court's offer because "[t]he annual payment cap was not an essential term." 266 Mich App at 160. We disagree. One of the principal concerns raised by Crawford County was that the retiree health care plan would create "massive liabilities [for Crawford County] in the future." Defendants' appendix at 330a. A higher first-year premium would exacerbate these concerns, because the health care plan would potentially have to pay an extra $1,676 for each person covered by the plan in the first year. Obviously, if the fund is required to pay a higher annual premium, the amount of money set aside for the benefit would

be depleted faster than anticipated when the board passed its resolution.

We conclude that the unambiguous language of the resolution is consistent with the understanding that Crawford County was willing to agree to the plan only if the starting health insurance cost was $4,087 for each employee. Because this figure was not the eventual starting cost of the health insurance, there was simply no meeting of the minds and therefore no contract. Further, no one disputes that the enhanced benefits plan could not have been implemented without the consent of all three funding units. Because the purported contract fails with respect to Crawford County inasmuch as there was no meeting of the minds, any contract between the Trial Court and the other funding units for the enhanced benefits plan must also fail.

In summary, a county board's duty to appropriate funds to the judiciary arises from the Constitution. Because a county has a preexisting duty to fund its trial courts, a county cannot enter into a contract with the Trial Court to fund the enhanced benefits plan at a specific level. Moreover, the purported contract fails with respect to Crawford County because there was no meeting of the minds. Because all three funding units had to agree to implement the enhanced benefits plan, any contract between the Trial Court and the other funding units for the enhanced benefits plan must also fail.

IV. CONCLUSION

We conclude that the Michigan Constitution only permits the judicial branch to directly compel the legislative

branch to appropriate when a court has not received sufficient funding to operate at a serviceable level. *Hillsdale Co, supra* at 722. A court deciding an "inherent power" claim must set forth findings of fact identifying specifically those judicial functions that will be in jeopardy if the appropriation requested is denied, and conclusions of law indicating why such functions implicate the constitutional responsibilities of the judiciary. We hold that the Trial Court here has failed to demonstrate by clear and convincing evidence that the requested appropriation for enhanced benefits was "reasonable and necessary" to the "serviceability" of the court. The Trial Court has failed to produce any evidence that even one employee was planning to leave if the enhanced benefits were not adopted or that anyone has refused to accept employment with the court because of the preexisting benefits plan. Moreover, the evidence demonstrates that the Trial Court has continued to carry out its essential judicial functions adequately. While the Trial Court may or may not have been functioning "happily" or "optimally," it is nonetheless reasonably functioning, which is all that is required to preclude the exercise of the judiciary's "inherent power."

We also conclude that because a county has a preexisting constitutional duty to fund its courts, the defendant counties could not enter into a contract with the Trial Court to fund the enhanced benefits plan at a specific level. Moreover, the purported contract fails with respect to Crawford County because there was no meeting of the minds. Since all three funding units had to agree to implement the enhanced benefits plan, any contract between the Trial Court and the other funding units for the enhanced benefits plan must also fail.

Accordingly, we reverse the judgment of the Court of Appeals and remand this matter to the circuit judge for entry of judgment in favor of the defendant counties. Increased public employee benefits in defendant counties must be enacted through the democratic processes of government--through the decision-making of the legislative branch-- not by judicial order.

/s/Stephen J. Markman
/s/Clifford W. Taylor
/s/Robert P. Young, Jr.

STATE OF MICHIGAN
SUPREME COURT

46TH CIRCUIT TRIAL COURT,
Plaintiff, Counter-Defendant,
Third-Party Plaintiff-Appellee,

V No. 128878

COUNTY OF CRAWFORD AND CRAWFORD COUNTY BOARD OF COMMISSIONERS,
Defendants, Counter-Plaintiffs,
Third-Party Plaintiffs-Appellants,

and

COUNTY OF KALKASKA,
Intervening Defendant,Counter-Plaintiff,
Third-Party Plaintiff-Appellant

and

COUNTY OF OTSEGO,
Third-Party Defendant

CORRIGAN, J. (*concurring*).

I concur in the result and virtually all of the reasoning of Justice Markman's lead opinion. In particular, I agree that "the judiciary has the inherent power to seek the funding necessary to sustain its ability to function serviceably in carrying out its constitutional responsibilities." *Ante* at 14. Further, I agree with the lead opinion that on the facts of this case, the enhanced retirement benefits sought by plaintiff do not fall within the judiciary's inherent authority to compel funding. I do not, however, join the portion of the lead opinion that adopts the reasoning set forth in *Wayne Co Prosecutor v Wayne Co Bd of Comm 'rs*, 93 Mich App 114; 286 NW2d 62 (1979).

In general, this Court does not reach constitutional issues that are not necessary to resolve a case. *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001). In my view, the existing authorities *of this Court* fully support the conclusion in Justice Markman's opinion that the enhanced retirement benefits at issue here are not reasonable and necessary to the serviceability of plaintiff's court. See, e.g., *Wayne Circuit Judges v Wayne Co (On Rehearing)*, 386 Mich 1; 190 NW2d 228 (1971) (*Wayne County II*), and other decisions of this Court discussed in the lead opinion.

Therefore, because plaintiff's inherent-powers claim must fail under this Court's own case law, I do not decide whether to adopt the analytic approach set forth by the Court of Appeals in *Wayne Co Prosecutor*. In particular, I do not find it necessary to adopt the assertions in *Wayne Co Prosecutor* that "[a] serviceable level of funding is the *minimum* budgetary appropriation at which statutorily mandated functions can be fulfilled," and that "[a] function funded at a serviceable level will be carried out in *a barely adequate manner*, but it will be carried out." *Wayne Co Prosecutor, supra* at 124.

In my view, it is simply not necessary in this case to decide whether the judiciary's inherent authority to compel funding should be limited to "minimum budgetary appropriation[s]" and to functions that are carried out "in a barely adequate manner." Rather, I decide this case on the basis of the existing authorities of this Court, which fully support our decision in this case.

For these reasons, I express no view on whether this Court should adopt the analysis outlined in *Wayne Co Prosecutor*. In all other respects, I concur in the analysis and

conclusions set forth in Justice Markman's lead opinion.

/s/Maura D. Corrigan

DISSENTING OPINIONS OMITTED AS IRRELEVANT

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

JOHN ENGLER
GOVERNOR

DOUGLAS B. ROBERTS
STATE TREASURER

April 3, 2002

John D. Ferry, Jr., State Court Administrator
State Court Administrative Office
Michigan Supreme Court P.O. Box 30048
Lansing, Michigan 48909

Dear Mr. Ferry:

The Michigan Department of Treasury, Bureau of Local Government Services, has completed its analysis of Crawford County and the 46th Circuit Trial Court. That analysis is enclosed.

For the purpose of determining the net cost of court operations, the department obtained the following information from prior audited financial statements comparing the data with the net cost analysis as prepared by the 46th Circuit Trial Court for Crawford County:

- For the years 1996 to 2001, the overall cost of the court's operations attributable to Crawford County, by major expenditure category.
- For the years 1996 to 2001, revenue received by the court and returned to Crawford County and other revenue recipients.
- For the years 1996 to 2001, from the items above, an analysis of the net costs of operations of the 46th Circuit

Trial Court to Crawford County (expenditure less revenue).

- The retirement plans currently available to the 46th Circuit Trial Court staff and to employees of Crawford County, with a summary of the level of benefits for each plan (including retiree health care, if any) and the costs of plans to the employer and to the individual employees.
- Related issues as needed to assist in the analysis of court operational expenses.

The Department also reviewed documentation provided by both Crawford County and the 46th Circuit Trial Court related to the dispute between the two entities. Treasury staff met with personnel of the counties of Crawford, Kalkaska and Otsego, which make up the funding units of the 46th Circuit Trial Court. Treasury staff also reviewed the net cost analysis of the operations of Otsego and Kalkaska counties using audited financial statements for years 1996 through 2000 to compare with the information presented by the 46th Circuit Trial Court. For year 2001, information from the general ledger print out of Otsego and Kalkaska counties was used to obtain the net cost of operations of the court related to these counties.

I hope that this information will be of assistance. If I can be of further assistance, please let me know.

Sincerely,

Frederick Headen, Deputy Director
Bureau of Local Government Services

Enclosure

cc: Mark Hilpert, Director,
Bureau of Local Government Services

Analysis of Funding Issues Concerning Crawford County and 46th Circuit Trial Court

April 3, 2002

Issue 1: Net Cost Analysis of Operations

Information for fiscal year 2001 was obtained from a draft audit report of Crawford County and from general ledger print outs from Otsego and Kalkaska counties. For 1997, the financial information used for Crawford County is from the audit report, which reflects 9 months of information due to a change in the county's fiscal year end to September 30. The information in the net cost analysis for the court shows 12 months of data for year 1997, therefore there is no bases for comparison. For the purpose of determining the net cost of court operations, the following information was obtained from the audited financial statements of Crawford, Kalkaska and Otsego counties:

- For the years 1996 to 2001, the overall cost of the court's operations attributable to each County, broken down by major expenditure category.
- For the years 1996 to 2001, the revenue received by the court and returned to each County and other revenue recipients.
- From the items above, an analysis of the net cost of operations of the 46th Circuit Trial Court to each County (expenditure less revenue) for the years 1996 to 2001.

In order to obtain a true reflection of net cost of operations, all revenue and expenditure sources must be shown. The

resulting schedules were compared with the information presented by the 46th Circuit Trial Court.

The financial data compiled for the most part did not agree with those prepared by the Court. For example:

- As disclosed in the schedules (Exhibits A through Exhibits C) prepared from audited financial reports for the years 1996 through 2000, the net cost of operation study prepared by the Court for all three counties was understated.
- For the most part the revenues agreed to the audited financial statements for Crawford County.
- In Otsego and Kalkaska counties there were differences between what the audit reflected and the court's analysis.
- The appropriation from the general fund to the law library was counted as revenue in the law library fund and the transfer out from the general fund was not shown at all.
- The expenditures in the court analysis of the cost of operations did not include all expenditure data related to the cost of the court operations regardless of county location.
- Grants and grant expenditures for the 46th Circuit Trial Court in Otsego County were not reflected in the net cost study performed by the court.
- Contributions from other counties were not shown as part of the court analysis for Otsego County.

Analysis of Funding Issues Concerning Crawford County and 46th Circuit Trial Court

April 3, 2002

Issue 2: Retirement Benefit Levels and Retiree Health Care

The court believes that the counties agreed to a retirement health fund that would pay a health benefit "to be determined by 2003", and the MERS B4/E2 retirement plan on the following dates:

- August 29, 2000 (special board meeting)– Crawford County passed 2 motions adopting the MERS B4 without the E2 rider and asked the court not to implement the benefits until the next fiscal year.
- September 12, 2000-Otsego County signed the agreement
- October 10, 2000-Kalkaska County signed the agreement

On August 29, 2000 the Crawford County Board of Commissioners minutes show that the commissioners ageed to the MERS benefit level by resolution of the board. However, Crawford County officials never signed the contract between the court and the funding units for the change in the benefit level. On February 1, 2002 the Crawford County Board of Commissioners rescinded the motion concerning the benefit level authorized in the August 29, 2000 minutes.

The discussion in the minutes dated August 29, 2000 shows that Crawford County had questions as to the cost of the retirement plan and that the cost would be difficult to determine without an actuarial evaluation. It also appears

that there were concerns over the unfunded liability for the retiree health plan.

Issue 3: Actuarial Evaluation

Crawford County expressed concerns related to whether there should be an actuarial evaluation performed on the increase in MERS retiree benefit level prior to giving the benefit to employees. We found no documentation that an actuarial evaluation was performed and actually shared with the elected officials of the three counties, prior to giving the benefit to the employees of the court.

A recent study by the Michigan Commission on Pensions and Retiree Health Care issues recommends an actuarial evaluation be performed prior to adopting an increased retirement benefit. The report states that benefits given to governmental employees today by elected officials often mean siglificant financial outlays for future taxpayers. It is important for everyone—plan participants, officials and the public—to be aware of the price of those benefits, over the short and long run, prior to granting such benefits. It was the recommendation of the Commission, that:

- Before any pension benefit is increased, new benefit granted, or change made that may result in a cost increase to the plan, a supplemental actuarial evaluation must be completed. The report should be given to the appropriate elected and appointed government officials before such change becomes effective.
- Before government officials vote on a change in a pension plan, the supplemental actuarial evaluation should be made available to the governmental officials and public for at least 30 days.

Analysis of Funding Issues Concerning Crawford County and 46th Circuit Trial Court

April 3, 2002

Issue 4: Retiree Health Fund

Pursuant to the agreement, a retiree health fund was established by Otsego County, the financial control unit. A deposit of $50,000 into the fund during the month of October 2000 was made with each county paying the agreed upon share of the following rates: Crawford County 24%, Kalkaska County 32% and Otsego County 44%. Annually, each year thereafter deposits of a like amount, plus 4% compounded annually are to go into the fund. The agreement states the Otsego County Treasurer would control the fund and make the investments. The agreement also states the fund is to be reviewed annually by the comptrollers of the funding units and the Chief Judge or his designee. However, it should be noted that State statute does not provide for a comptroller in county government. The fund would be reviewed five years after its inception by the joint judicial council and at three-year intervals thereafter.

The retiree health fund was not established in accordance with Public Act 149 of 1999, the Public Employee Health Care Fund Investment Act. The investments of the fund must be in accordance with PA 20 of 1943, as amended and must comply with the Otsego County investment policy.
The Act permits the legislative body of a public corporation (county) to establish a public employee health care fund by resolution to provide for the funding of health care benefits to retired employees of the public corporation and their beneficiaries.

The resolution must include all of the following:

a) The designation of a person or persons who shall act as the fund's investment fiduciary.

b) A restriction of withdrawals from the fund solely for the payment of health care benefits on behalf of qualified persons and the payment of the expenses of administration of the fund.

c) The designation of who is a qualified person for purposes of payment of health care benefits from the fund.

d) A determination of whether the fund will be established on an actuarial basis.

e)

The investment fiduciary is required to invest the assets of the fund in accordance with an investment policy adopted by the governing body of a public corporation, and in compliance with Section 13 of PA 314 of 1965, the Public Employee Retirement System Investment Act. The public corporation may invest the fund's assets in the investment instruments and is subject to the limitations governing the investment of assets of public employee retirement systems under the Act. The establishing resolution must indicate whether the fund is to be established on an actuarial basis. The Act does not require that the fund be on an actuarial basis, however, actuarial reports from the investment fiduciary are still required every five years.

Analysis of Funding Issues Concerning Crawford County and 46th Circuit Trial Court

April 3, 2002

Issue 5: Budgeting

The financial control unit (Otsego County) adopted the 2001 budget for the 46th Trial Court on December 12, 2000. On April 10th and November 13th, 2001 the Otsego County Board of Commissioners adopted an increase in the court's budget. There was no documentation provided that showed the Crawford County Board of Commissioners had adopted an amendment to their budget for the increase in their contribution amount.

Public Act 2 of 1968, the Uniform Budgeting and Accounting Act, provides that a deviation from the original general appropriations act shall not be made without amending the general appropriations act. Furthermore, section 18 of the Act provides that an administrative officer of the local unit shall not incur expenditures against an appropriation account in excess of the amount appropriated by the legislative body. The chief administrative officer, an administrative officer, or an employee of the local unit shall not apply or divert money of the local unit for purposes inconsistent with those specified in the appropriations of the legislative body.

Section 19 of the Act provides that a member of the legislative body, the chief administrative officer, an administrative officer, or an employee of a local unit shall not authorize or participate in the expenditure of funds except as authorized by a general appropriations act. An

expenditure shall not be incurred except in pursuance of the authority and appropriations of the legislative body of the local unit.

There is no provision in the Uniform Budgeting and Accounting Act that authorizes the legislative body of one local unit to amend the appropriations act (budget) of another local unit.

Issue 6: Retirement Plan Cost

The retirement plans currently available to 46th Circuit Trial Court staff and to employees of Crawford County are presented in Exhibit D with a summary of the level of benefits for each plan (including retiree health care, if any), the benefit provisions and the required annual contribution for the retirement plans for both the court and Crawford County. The required annual contribution is the true cost to the county for retirement
plan purposes.

1996 to 2001 Financial Comparison

APPENDIX

[OMITTED AS IRRELEVANT]

Order

Entered: Nov. 1, 2006

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

126088-90 & (136)(180)
(181)(190)(194)(195)(197)
46th Circuit Trial Court
Plaintiff, Counter-
Defendant, Third-
Party Defendant-Appellee

v

County of Crawford and
Crawford County Board
of Commissioners
Defendants, Counter
Plaintiffs-Third
PartyAppellants

SC: 126088-90
COA: 246823, 248593, 251390
Crawford CC: 02-005951-CZ

and

Kalkaska County,
Intervening Defendant,
Counter-Plaintiff, Third-
Party Plaintiff, Appellant

and

Otsego County,
Third Party Defendant-Appellee

_____/

By order of December 28, 2005, the application for leave to appeal the April 1, 2004 judgment of the Court of Appeals and the application for leave to appeal as cross-appellant were held in abeyance pending the decision in *46th*

Circuit Trial Court v Crawford County (Docket No. 128878). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 131 (2006), the applications are again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we VACATE in part the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for reconsideration of whether the 46th Circuit Trial Court is entitled to recover reasonable attorney fees, in light of this Court's decision in *46th Circuit Trial Court v Crawford County* (Docket No. 128878). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

The motions for immediate consideration and for peremptory reversal are DENIED. The remaining motions for miscellaneous relief are GRANTED. A public question being involved, and in light of the relationships between the parties, no costs are awarded.

KELLY, J., would deny leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 1, 2006 /s/ Corbin A. Davis
Clerk

Order

Entered: Nov. 1, 2006

128880 & (85)(86) (88)(91)

County of Crawford and
County of Kalkaska,
Plaintiffs-Appellants

v

County of Otsego,
Defendant-Appellee

Michigan Supreme Court
Lansing, Michigan
Clifford W. Taylor,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 1228284
COA: 254182
Crawford CC: 02-010014-CZ

/

By order of December 28, 2005, the application for leave to appeal the May 3, 2005 judgment of the Court of Appeals was held in abeyance pending the decision in *46th Circuit Trial Court v Crawford County* (Docket No. 128878). On order of the Court, the case having been decided on July 28, 2006, 476 Mich 131 (2006), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we VACATE in part the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals, which shall hold this case in abeyance pending its decision on remand in *46th Circuit Trial Court v Crawford County* (Court of Appeals Docket Nos. 246823, 248593 and 251390). After *46th Circuit Trial Court v Crawford County* is decided on remand, the Court of Appeals shall reconsider whether Otsego County is entitled to reimbursement for any attorney fees paid on behalf of the 46th Circuit Trial Court. In all other respects, leave to appeal

is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

The motions for immediate consideration and for peremptory reversal are DENIED. The remaining motions for miscellaneous relief are GRANTED. A public question being involved, and in light of the relationships between the parties, no costs are awarded.

KELLY, J., would deny leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 1, 2006 /s/ Corbin A. Davis
Clerk

MICHIGAN DEPARTMENT OF LABOR & ECONOMIC GROWTH NONPROFIT CORPORATION INFORMATION UPDATE - 2005

Identification Number **711890**	Corporation Name MI JUDGES ASSOC, INC.

Resident agent name and address of the registered office
ALTON T. DAVIS **FILED SEP 28 2005**
200 W. MICHIGAN AVE., GRAYLING, MI 49738

1. Mailing address of registered office in Michigan: 401 S. Old Woodward Ave., Suite 400, Birmingham, MI 48009	2. Resident Agt Alex L. Alexopoulos

4. Describe the purpose and activities of the corporation during the year covered by this report: To improve the quality and administration of justice in the State of Michigan and to promote a closer working relationship among members of the judiciary.

5. **NAME**	**ADDRESS**
President Hon. Robert M. Ransom	900 S. Saginaw St. Flint, MI 48502
Secretary Hon. Michael F. Sapala	2 Woodward Ave. Detroit, MI 48226
Treasurer Hon. Jeffrey L. Martlew	100 E. State St. St. Johns, MI 48879
Vice President Hon. Phillip E. Rodgers	328 Washington St. Traverse City, MI 49684
Director Hon. Robert M. Ransom	900 S. Saginaw St. Flint, MI 48502

Signature	Title	Date	Phone
/s/ Robert M. Ransom	President	9/16/05	

MICHIGAN DEPARTMENT OF LABOR & ECONOMIC GROWTH NONPROFIT CORPORATION INFORMATION UPDATE - 2004

Identification Number **711890**	Corporation Name MI JUDGES ASSOC, INC.

Resident agent name and address of the registered office
ALTON T. DAVIS **FILED AUG 2004**
200 W. MICHIGAN AVE., GRAYLING, MI 49738

1. Mailing address of registered office in Michigan:	2. Resident Agt

4. Describe the purpose and activities of the corporation during the year covered by this report: To improve the quality and administration of justice in the State of Michigan and to promote a closer working relationship among members of the judiciary.

5. **NAME**	**ADDRESS**
President Hon. Alton T. Davis	200 W. Michian Ave. Grayling, MI 49738
Secretary Hon. Philip E. Rodgers	328 Washington St. Traverse City, MI 49684
Treasurer Hon. Michael F. Sapala	2 Woodward Ave. Detroit, MI 48226
Vice President Hon. Nanci J. Grant	1200 N. Telegraph Pontiac, MI 48341
Director Hon. Alton T. Davis	200 W. Michigan Ave. Grayling, MI 49738

Signature	Title	Date	Phone
/s/ Alton T. Davis	President	7/27/04	

MICHIGAN DEPARTMENT OF LABOR & ECONOMIC GROWTH NONPROFIT CORPORATION INFORMATION UPDATE - 2003

Identification Number 711890	Corporation Name MI JUDGES ASSOC, INC.

Resident agent name and address of the registered office
ALTON T. DAVIS **FILED AUG 2003**
200 W. MICHIGAN AVE., GRAYLING, MI 49738

1. Mailing address of registered office in Michigan:	2. Resident Agt

4. Describe the purpose and activities of the corporation during the year covered by this report: To improve the quality and administration of justice in the State of Michigan and to promote a closer working relationship among members of the judiciary.

5. NAME	ADDRESS
President Hon. Peter J. Maceroni	40 N. Main St. Mt. Clemens, MI 48043
Secretary Hon. Nanci J. Grant	1200 N. Telegraph Pontiac, MI 48341
Treasurer Hon. Philip E. Rodgers	328 Washington St. Traverse City, MI 49684
Vice President Hon. Robert M. Ransom	900 S. Saginaw St. Flint, MI 48502
Director Hon. Peter J. Maceroni	40 N. Main St. Mt. Clemens, MI 48043

Signature	Title	Date	Phone
/s/ Alton T. Davis	President Elect	8/17/03	

MICHIGAN DEPARTMENT OF LABOR & ECONOMIC GROWTH NONPROFIT CORPORATION INFORMATION UPDATE - 2002

Identification Number **711890**	Corporation Name MI JUDGES ASSOC, INC.

Resident agent name and address of the registered office
ALTON T. DAVIS **FILED SEPT 02**
200 W. MICHIGAN AVE., GRAYLING, MI 49738

1. Mailing address of registered office in Michigan:	2. Resident Agt

4. Describe the purpose and activities of the corporation during the year covered by this report: To improve the quality and administration of justice in the State of Michigan and to promote a closer working relationship among members of the judiciary.

5. **NAME**	**ADDRESS**
President Hon. Lawrence C. Root	400 Elm Big Rapids, MI 49307
Secretary Hon. Robert M. Ransom	900 S. Saginaw St. Flint, MI 48043
Treasurer Hon. Nanci J. Grant	1200 N. Telegraph Rd, Dept 404 Pontiac, MI 48431
Vice President Hon. Alton T. Davis	200 W. Michigan Ave. Grayling, MI 49738
Director Hon. Lawrence C. Root	400 Elm Big Rapids, MI 49307

Signature	Title	Date	Phone 989
/s/ Alton T. Davis	President	8/20/02	344-3247

MICHIGAN DEPARTMENT OF LABOR & ECONOMIC GROWTH NONPROFIT CORPORATION INFORMATION UPDATE - 2001

Identification Number **711890**	Corporation Name MI JUDGES ASSOC, INC.

Resident agent name and address of the registered office
THOMAS L. BROWN **FILED OCT 2001**
106 S. WASH SQ, LANSING, MI 48933

1. Mailing address of registered office in Michigan: 200 W. Michigan Ave., Grayling, MI 49738	2. Resident Agt Alton T. Davis

4. Describe the purpose and activities of the corporation during the year covered by this report: To improve the quality and administration of justice in the State of Michigan and to promote a closer working relationship among members of the judiciary.

5. **NAME**	**ADDRESS**
President Hon. Kurtis T. Wilder	1001 Woodward, Ste 900 Detroit, MI 48226
Secretary Hon. Alton T. Davis	200 W. Michigan Ave. Grayling, MI 49738
Treasurer Hon. Robert M. Ransom	900 S. Saginaw St. Flint, MI 48502
Vice President Hon Peter J. Maceroni	40 N. Main St. Mt. Clemens, MI 48043
Director Hon. Kurtis T. Wilder	1001 Woodward, Ste 900 Detroit, MI 48226

Signature	Title	Date	Phone 810
/s/ Robert M. Ransom	Treasurer	9/28/01	257-3270

MICHIGAN DEPARTMENT OF LABOR & ECONOMIC GROWTH NONPROFIT CORPORATION INFORMATION UPDATE - 2000

Identification Number **711890**	Corporation Name MI JUDGES ASSOC, INC.

Resident agent name and address of the registered office
THOMAS L. BROWN
106 S. WASH SQ, LANSING, MI 48933

1. Mailing address of registered office in Michigan: 106 S. Washington Sq., Lansing, MI 48933	2. Resident Agt Thomas L. Brown

4. Describe the purpose and activities of the corporation during the year covered by this report: To improve the quality and administration of justice in the State of Michigan and to promote a closer working relationship among members of the judiciary.

5. **NAME**	**ADDRESS**
President Hon. Barry L. Howard	1200 N. Telegraph Rd. Pontiac, MI 48341
Secretary Hon. Peter J. Maceroni	40 N. Main St. Mt. Clemens, MI 48043
Treasurer Hon. Alton T. Davis	200 W. Michigan Ave. Grayling, MI 49738
Vice President Hon. Lawrence C. Root	400 Elm, PO 822 Big Rapids, MI 49307
Director Hon. Barry L. Howard	1200 N. Telegraph Rd. Pontiac, MI 48341

Signature	Title	Date	Phone 517
/s/ Alton T. Davis	Treasurer	9/20/00	344-3247

MICHIGAN DEPARTMENT OF COMMERCE
CORPORATION AND SECURITIES BUREAU

FILED APR 8 1983 Date Received
APR 5 - 1983

CORPORATION IDENTIFICATION NUMBER: 711-890

ARTICLES OF INCORPORATION
For use by Domestic Nonprofit Corporations

Pursuant to the provisions of Act 162, Public Acts 1982, the undersigned corporation executes the following Articles:

ARTICLE I
The name of the corporation is:
MICHIGAN JUDGES ASSOCIATION, INC.

ARTICLE II
The purposes for which the corporation is organized are:
To promote the general welfare of the membership and the administration of justice and to bring the Judges into a closer relationship with one another.

ARTICLE III
The corporation is organized upon a
Nonstock basis.
(stock or nonstock)

1. If organized on a stock basis, the aggregate number of shares which the corporation has authority to issue is _____. If the shares are, or are to be, divided into classes, the designation of each class, the number of shares in each class, and the relative rights, preferences and limitations of the shares of each class are as follows:

ARTICLE III

2. If organized on a nonstock basis, the description and value of its real property assets are: (if none, insert none)

NONE

and the description and value of its personal property assets are: (if none, insert none)

Cash - as at 2/15/83 $34,036.83

The corporation is to be financed under the following general plan:

Membership dues

The corporation is organized on a membership basis.

ARTICLE IV

1. The address of the registered office is:
1201 City-County Building Detroit, Michigan 48826

2. The mailing address of the registered office if different:

3. The name of the resident agent at the registered office:
Hon. Richard D. Dunn

ARTICLE V

The name(s) and address(es) of all the incorporator(s) is (are) as follows:

NAME	RESIDENCE
Richard D. Dunn	1201 City-County Building, Detroit, MI 48226

ARTICLE VII OF ARTICLES OF INCORPORATION FOR MICHIGAN JUDGES ASSOCIATION, INC.

PROHIBITIONS

At all times, and notwithstanding any change in name, merger, consolidation, re-organization, termination, dissolution, or winding up of this Corporation, voluntary or involuntary, or by operation of law, or any other provision hereof:

(a) The Corporation shall not possess or exercise any power or authority either expressly, by interpretation, or by operation of law that will prevent it at any time from qualifying and continuing to qualify as a Corporation described in Section 501(c)(6) or other sections, of the Internal Revenue Code of 1954, as amended, hereinafter, referred to as the Code or I.R.C.; nor shall it engage directly or indirectly in any activity which would cause the loss of such qualification.

(b) No part of the assets or net earnings of the Corporation shall ever be used, nor shall the Corporation ever be organized or operated for purposes that do not exclusively promote social welfare within the meaning of Section 501(c)(6), or other sections, of the Code.

(c) The Corporation shall never be operated for the primary purpose of carrying on a trade or business for profit.

(d) At no time shall the Corporation engage in any activities which are unlawful under the laws of the United States of America, the State of Michigan, or any other jurisdiction where its activities are carried on.

(e) No compensation, loan, or other payment shall be paid to any officer, board member, creator, or organizer of the Corporation, or substantial contributor to it, except as reasonable compensation for services rendered and/or as a reasonable compensation for authorized expenditures incurred on behalf of the Corporation; and no part of the assets or net earnings, current or accumulated, of the Corporation shall ever

be distributed to or d[illegible]ed among such person, or inure, be used for, accrue or to benefit any such person or private individual.

DISSOLUTION

Upon the termination, dissolution, or winding up of the Corporation in any manner or for any reason, its assets, if any, remaining after payment (or provision for payment) of all liabilities of the Corporation, shall be distributed to, and only to, one or more organizations having either exclusively charitable, religious, scientific, or educational purposes or a primary purpose to promote social welfare or only for exempt purposes as described in Section 501(c)(6) or other similarly applicable sections, of the Code.

MEMBERSHIP

The Corporation shall have members, as provided for in the Constitution.

CAPITALIZATION

The Corporation shall issue no capital stock.

OFFICERS

The officers of this Association shall be a President, a first Vice President, a second Vice President, a Secretary and a Treasurer, to be elected at each annual meeting of the Association, and to hold office for a term of one year commencing on January 1 next following election. Each officer shall hold office until his or her successor shall have been duly elected and qualified. The three immediate active past Presidents shall constitute a nominating committee.

CONSTITUTION

Provisions for the regulation of the internal affairs of the Corporation, except as provided in these Articles, shall be determined and fixed by the Constitution of the Michigan Judges Association.

Article VI (Optional. Delete in its entirety if not applicable)
Any action required or permitted by the Act to be taken at an annual or special meeting of shareholders or members may be taken without a meeting, without prior notice, and without a vote, if a consent in writing, setting forth the action so taken is signed by the holders of outstanding stock or members having not less than the minimum number of votes that would be necessary to authorize or take the action at a meeting at which all shares or members entitled to vote thereon were present and voted. Prompt notice of the taking of the corporate action without a meeting by less than unanimous consent shall be given to shareholders or members who have not consented in writing.

Use space below for additional Articles or for continuation of previous Articles.

ARTICLE VII - See attached which is made a part hereof.

I (We) the incorporator(s) sign my (our) name(s) this 28 day of March, 1983.

/s/
Richard D. Dunn

DOCUMENT WILL BE RETURNED TO NAME AND MAILING ADDRESS INDICATED:

SEYMOUR KRAUS, P.C.
Attorney at Law
16000 W. Nine Mile Rd., Ste 507
Southfield, Michigan 48075

Telephone:
313
557-6330

INFORMATION AND INSTRUCTIONS

1. Submit one original copy of this document. Upon filing, a

microfilm copy will be prepared for the records of the Corporation and Securities Bureau. The original copy will be returned to the address appearing in the box above as evidence of filing.

Since this document must be microfilmed, it is important that the filing be legible. Documents with poor black and white contrast, or otherwise illegible, will be rejected.

2. This document is to be used pursuant to the provisions of Act 162, PA of 1982 by one or more persons for the purpose of forming a domestic nonprofit corporation.

3. Article II - The specific purpose for which the corporation is organized must be included. It is not sufficient to state that the corporation may engage in any activity within the purposes for which corporations may be organized under the Act.

4. Article III - Complete Item III(1) or III(2) as appropriate, but not both.

5. Article IV - A post office box may not be designated as the street address of the registered office. The mailing address may differ from the address of the registered office only if a post office box address in the same city as the registered office is designated as the mailing address.

6. Article V - The Act requires one or more incorporators. The addresses should include street number and name (or other designation), city and state.

7. This document is effective on the date approved and filed by the Bureau. A later effective date, no more than 90 days after the date of delivery, may be stated as an additional article.

8. This document must be signed in ink by each incorporator. However, if there are 3 or more incorporators, they may, by resolution adopted at the organizational meeting by a written instrument, designate one of them to sign the articles of incorporation on behalf of all of them. In such event, these articles of incorporation must be accompanied by a copy of the

resolution duly certified by the acting secretary at the organizational meeting and a statement must be placed in the articles incorporating that resolution into them.

9. FEES: Filing fee $10.00
Franchise fee $10.00
Total fees $20.00

MICHIGAN DEPARTMENT OF COMMERCE
CORPORATION AND SECURITIES BUREAU

EXPIRATION DATE: December 31, 1988
FILED APR 8 1983
DATE RECEIVED: APR 5 1983

CERTIFICATE OF ASSUMED NAME

For use by Corporations and Limited Partnerships

Pursuant to the provisions of Act 284, Public Acts of 1972, as amended (profit corporations) Act 162, Public Acts of 1982 (non-profit corporations), or Act 213, Public Acts of 1982 (limited partnerships), the corporation or limited partnership in item one below executes the following certificate:

1. The true name of the corporation or limited partnership is:
MICHIGAN JUDGES ASSOCIATION, INC.
2. The identification number assigned by the Bureau is:
3. The location of the corporate registered office is:
1201 City-County Building Detroit, MI 48226
4. The assumed name under which business is to be transacted is:
MICHIGAN JUDGES ASSOCIATION, INC.

Signed this 28 day of March, 1983
By /s/
Richard D. Dunn

Michigan Lawyers Weekly: Board of Editors

HON. DENNIS C. KOLENDA

Grand Rapids

Judge Dennis C. Kolenda was born and raised in Grand Rapids. After graduating from high school, he attended the University of Michigan, where he obtained a bachelor's degree in 1969. From there, he on to the Harvard Law School, where he obtained his law degree in 1972. Rather than head to New York or Washington, Judge Kolenda returned to Grand Rapids where he served as a law clerk to the Hon. Robert B. Bums of the Michigan Court of Appeals. From there, he became the chief trial attorney for the Kent County Office of the Defender and later shifted his practice to commercial litigation when he became a partner in the law firm of Varnum, Riddering, Schmidt & Howlett.

Judge Kolenda was elected to the Kent County Circuit Court in November, 1988. His colleagues on the court elected him Chief Judge in November, 1993. The Supreme Court reappointed him to that positic 1995, and again in 1997.

In addition to practicing law, Judge Kolenda taught political science at Aquinas College for ten years. has served by appointment of the Michigan Supreme Court on the Michigan Attorney Grievance Commission and on numerous special committees charged with promulgating rules for the operation Michigan courts. He currently chairs a special committee to revise the Michigan Criminal Code, and h serves on the Rules Committee of the Michigan Judges Association. Judge Kolenda is often on the fE of programs sponsored by the Michigan Institute for Continuing Legal Education, the Michigan Judici Institute, the Prosecuting Attorneys Association of Michigan, and the Criminal Defense Attorneys Association of Michigan.

His community service has included serving on the board of directors of the Maria School for Girls, the Methodist Community House, the Kent County Chapter of the March of Dir the Polish Heritage Society, and the Kent County Humane Society.

http://www.milawyersweekly.com/boe.cfm

STATE OF MICHIGAN
IN THE SUPREME COURT

46th CIRCUIT TRIAL COURT,
Plaintiff - Counterdefendant - Appellee,

v

Supreme C urt No. _____
Court of Appeals No. 254181
46th Circuit Court (Crawford)
No. 02-5951-CZ

CRAWFORD COUNTY and
CRAWFORD COUNTY BOARD OF COMMISSIONERS,
Defendants - Counterplaintiffs - Third Party Plaintiffs

and

KALKASKA COUNTY,
Intervening Defendant - Counterplaintiff -
Third Party Plaintiff

and

COHL, STOKER, TOSKEY & McGLINCHEY, P.C.,
Appellant,

v

OTSEGO COUNTY,
Third-Party Defendant.

APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL

Submitted by: Allan Falk (P13278)
ALLAN FALK, P.C.
Counsel for Appellant Cohl, Stoker,
Toskey & McGlinchey, P.C.
2010 Cimarron Drive
Okemos, MI 48864-3908
(517) 381-8449/*fax (517) 381-8450*

STATEMENT OF JURISDICTION

The jurisdiction of the Court of Appeals is defined by law. Const 1963, art 6, § 10. The Court of Appeals has jurisdiction over appeals as of right from final judgments of the circuit courts. MCL 600.308(1)(a).

In this case, the final judgment as defined in MCR 7.202(7)(a)(i) was entered in these consolidated cases (both filed in the circuit court for the 46th circuit– Case No. 02-5291-CZ, which was filed in Crawford County, and Case No. 02-10014-CZ, which was filed in Otsego County, both being part of the 46th judicial circuit per MCL 600.1162(d) on February 26, 2004. A timely claim of appeal was then filed on March 3, 2004. MCR 7.204(A)(1)(a). The Court of Appeals therefore had proper and plenary jurisdiction of this appeal. MCR 7.203(A)(1). This appeal of right subsumed an appeal of all underlying interlocutory orders, any or all of which may be challenged by the appellants in an appeal of right from the final order. *Tomkiw v Sauceda*, 374 Mich 381; 132 NW2d 125 (1965).

This timely application for leave to appeal from the Court of Appeals' May 3, 2005 opinion adjudicating that appeal of right is therefore within the Supreme Court's jurisdiction pursuant to MCR 7.301(A)(2) and Const. 1963, art. 6, §4.

STATEMENT OF QUESTIONS PRESENTED

I. DID THE LOWER COURT ERR IN SANCTIONING COUNSEL FOR HAVING RAISED THE DEFENSE OF FRAUD?

A. Whether A Sufricient Good Faith Argument In Support Of The Fraud Claims Was Made To Preclude The Imposition Of Sanctions For "Frivolous Pleading."

B Whether The Lower Court Erred In Sanctioning Counsel For Failure To Go Beyond The Information Supplied By The Clients In Order To Learn That Facts Claimed Were Untrue.

Defendants/Appellants say, "Yes" to the principal question and all subquestions.

Plaintiff/Appellee says, "No."

The lower Court said, "No."

II. DID THE LOWER COURT ERR IN SUMMARILY DISMISSING THE DEFENSE OF FRAUD AND SILENT FRAUD?

A. Did The Lower Court Err In Attributing Supposed Knowledge Of An

Agent (Of Only Crawford County) To The Crawford County Board of Commissioners, Where No Transaction Was Consummated By Crawford County Through An Agent?

1. Does The Doctrine That Knowledge Of The Agent Is Knowledge Of The Principal Only Apply To Transactions Consummated Through An Agent?

2. Did The Lower Court Rely On Inadmissible Evidence, In Violation of Attorney-Client Privilege, In Determining That Crawford County's Controller Had Actual Knowledge Of The Claimed Fraudulent Representation?

B. Did Whatever Was "Known" To the Crawford County Controller Fall Short Of "Actual Knowledge" Of A False Representation?

C. Did The Lower Court Err In Finding No Triable Issue Of Fact As to Fraud?

Defendants/Appellants say, "Yes" to the principal question and all subquestions.

Plaintiff/Appellee says, "No."

The lower Court said, "No."

III. WAS THE DECEMBER 14, 2001 LETTER FROM MR. COMPO TO MR. COHL PROTECTED BY ATTORNEY-CLIENT PRIVILEGE, SUCH THAT ANY USE OF THAT DOCUMENT BY PLAINTIFF IN THIS LITIGATION WAS IMPROPER?

A. Did The Lower Court Err In Finding The Privilege Protecting The December 14th Communication Validly Waived?

Defendants/Appellants say, "Yes" to the principal question and the subquestion.

Plaintiff/Appellee says, "No."

The lower Court said, "No."

IV. DID THE LOWER COURT ERR IN THE MANNER IN WHICH IT LIQUIDATED THE AMOUNT OF SANCTION, IN THAT PLAINTIFF'S ATTORNEYS THEMSELVES COULD NOT ASCERTAIN THE HOURS DEVOTED TO THE FRAUD DEFENSE?

A. Whether Plaintiff's Attorney's Guesstimate as to the Amount of Hours Devoted to Defending the Retiree Health Care Fraud Counterclaim Was Not Sufficient to Carry Its Burden of

Proof?

B. Whether The Lower Court Erred In Failing To Hold An Evidentiary Hearing To Liquidate Attorney Fees Awarded As Sanctions?

Defendants/Appellants say, "Yes" to the principal question and all subquestions.

Plaintiff/Appellee says, "No."

The lower Court said, "No."

REASONS FOR GRANTING LEAVE FOR APPEAL

Pursuant to MCR 7.302(B)(3) and (5), leave to appeal should be granted to address the following jurisprudentially significant issues *inter alia*:

- The lower courts imposed sanctions on counsel for vigorously advocating the interests of their clients, based on good faith legal arguments and substantial factual support, thereby threatening to chill the rights of counties opposing judicial "inherent powers" funding claims an also threatening to render county counsel impotent to protect their clients against judicial overreaching;

- The lower court decisions ignore flagrant misrepresentations of fact used to procure alleged "contracts" for luxury fringe benefits, yet summarily dismiss such issues and sanction the counties and their counsel for even raising them, when triable issues of fact are present;

- The lower courts violate fundamental constitutional principles by liquidating the amount of sanctions, including attorney fees, without an evidentiary hearing, where the amount of such fees were contested, and the credibility of the claimants and their accounting methodology was in dispute.

I. INTRODUCTION

The standard warranting an award for sanctions under MCR 2.114(E), which the 46th Circuit Trial Court ("plaintiff" or "plaintiff court") continually failed to reference throughout the litigation is:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure prevailing party;
(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true; or
(iii) The party's legal position was devoid of arguable legal merit.

MCL 600.2591(3)(a); See also *Szymanski* v *Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997); *Meagher* v *Wayne State Univ*, 222 Mich App 700, 727; 565 NW2d 401 (1997) (claim is frivolous if party's primary purpose for bringing suit or defense was to harass, embarrass, or injure prevailing party; if party has no reasonable basis to believe underlying facts were true; or if party's position is without arguable legal merit.) Further, frivolousness for purposes of MCL 600.2591 or MCR 2.114(E) is determined as of the time a complaint is filed, *not* later. *Jerico Constr, Inc* v *Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003); *Meagher v Wayne State Univ, supra*, 222 Mich App at 727.

There is no question that the claims and defenses asserted by the law firm of Cohl, Stoker, Toskey & McGlinchey, P.C., on behalf of Crawford and Kalkaska Counties in response to plaintiff's lawsuit against the two

counties were made in good-faith and well-grounded in fact and law at the time the responsive pleadings were drafted. Crawford and Kalkaska Counties and their counsel undertook numerous efforts and conducted reasonable investigations prior to filing the pleadings (Appendix 17). Counsel met extensively with their clients and drafted the pleadings on the basis of their clients representations and other information provided by commissioners from both counties. Further, their clients submitted Affidavits which buttressed the claims contained in the pleadings (Appendix 18).

The facts that counsel for the defendant counties knew with *certainty* at the time the plaintiff court filed the lawsuit were: (1) representatives of the plaintiff court had made misrepresentations of the cost for the Retiree Health Care Fund; and (2) their clients indicated that they had relied on the misrepresentations in either passing resolutions and/or approving the benefits; and (3) that either the 46th Circuit Court or Otsego County had made misrepresentations in denying the existence and/or possession of MERS actuarial retirement cost studies after a Freedom of Information Act (FOIA) request to MERS revealed that nine (9) such studies had in fact been generated and disseminated (beginning as early as May, 2000); and (4) the Michigan Department of Treasury in a report dated April 3, 2002 had indicated seven (7) areas of inaccuracies with respect to financial information provided by the 46th Circuit Court in support for its demand for enhanced fringe benefits. (Appendix 15). Thus, the appellant law firm drafted the pleadings accordingly.

Despite all their efforts, and considering the information at their disposal, however, the appellant law firm was sanctioned solely because of a single attorney-client privileged memorandum drafted by a non-commissioner

sixteen months after the fact, which purported to delve into the minds of Crawford commissioners at the time of an August 29, 2000 meeting (Appendix 25 (under seal)). According to the trial court, and in contravention of *Braman v Bosworth*, 112 Mich App 518, 522; 316 NW2d 255 (1982), that memorandum required counsel to ignore, discount or reject all contrary information and evidence in counsel's possession at the time the pleadings were drafted, and warrants the imposition of sanctions against the appellant law firm – in essence finding the Counties' claim was devoid of any arguable legal merit without submitting the conflicting evidence to a trier of fact.

II. STATEMENT OF FACTS

A. Procedural History

This appeal by the law firm of Cohl, Stoker, Toskey & McGlinchey, P.C., concerns the trial court's imposition of sanctions against the firm for "frivolous pleading" with regard to a defensive claim of fraud as to one aspect of plaintiff 46th Circuit Trial Court's lawsuit. The Court of Appeals affirmed in a published opinion. (Appendix 1).

The 46th Circuit Trial Court desired to enhance its employee benefits while bringing all employees from its three counties into the same health insurance and pension plans. It proposed a PPO-1 health insurance plan, but insisted on extending such coverage to retirees and their spouses, or paying retirees 50% of the premium costs if they elected not to accept such insurance.

Crawford's judicial employees already were covered by the PPO-1 plan (excluding retiree health insurance); Kalkaska and Otsego employees then had more expensive, "antiquated"

health insurance plans (Appendix 6, p 8). Plaintiff represented that its plan would be revenue neutral, and could be financed from savings in Kalkaska and Otsego combined with having a prescription drug rider with a $10 co-pay, and by setting aside 0.5% (one-eighth) of a 4% annual pay increase in the first three years to fund the switch.

Based on the Plaintiff's financial projections, Otsego and Kalkaska eventually approved the requested benefits; Crawford flatly refused to approve the proposed pension plan change, and approved the health insurance proposal by linking its agreement to Plaintiff's grossly inaccurate cost representations[1]. When that inaccuracy came to light, both Crawford and Kalkaska passed rescinding resolutions, and Crawford refused repeated requests to accept the retiree healthcare plan with the corrected financial figures. (Appendix 10 and 11)

Plaintiff court then filed suit on November 19, 2002, against Crawford County, seeking to compel Crawford to appropriate additional fringe benefit monies so as to fund plaintiff's desired retiree health care plan and costly MERS B-4 pension plan. Its complaint proceeded on theories of breach

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[1] "County pay 24% of $50,000. ($12,000) for the year 2000 and that payment will increase at 4% per year until 2017, and at that time will pay an estimated $94,649 and that the Blue Cross/Blue Shield medical supplement payment per individual would be capped at the year 2000 at $4,087 would increase at 4% per year until 2017 for an employee to be eligible for $7,654 per year." (Appendix 4, p 3, Crawford's August 29, 2000 "Retiree Healthcare Resolution")

of contract and failure to fund its budget at a constitutionally adequate level. Plaintiff also sought recovery of attorney fees. Kent Circuit Judge Dennis C. Kolenda was assigned to preside over the litigation.

On December 9, 2002, Crawford answered and filed a Counter-Complaint, defensive in nature, seeking declaratory and injunctive relief. Kalkaska County joined the lawsuit as an Intervening Third Party Plaintiff. Crawford's and Kalkaska's pleadings both alleged, *inter alia*, that the 46th Circuit Trial Court, if it had an otherwise valid contract claim, had procured it by fraud (Count III) and silent fraud (Count IV), either of which would serve to bar recovery.[2]

The Counties' claims of fraud and silent fraud were premised upon two distinct factual scenarios: (1) misrepresentations by Plaintiff (through its agents) to each County's Board of Commissioners regarding the costs of the retiree health care plan, and (2) misrepresentations made by the plaintiff court as to the cost of its proposed MERS B-4 plan, and the concomitant failure to disclose actuarial studies for the MERS B-4 plan that were in its possession and which were significantly at odds with the cost projections promoted by

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[2] Both fraud in the inducement and fraud in the execution are viable defenses to a claim based on contract. *USF&G v Black*, 412 Mich 99, 117 n. 9; 313 NW2d 77 (1981); *Rood v Midwest Matrix Mart, Inc*, 350 Mich 559, 570; 87 NW2d 186 (1957). Such contracts are void, rather than merely voidable. *Stewart v Eldred*, 349 Mich 28, 33; 84 NW2d 496 (1957). Such a defense is not defeated by proof of negligence on the part of the innocent party. *Sautter v Ney*, 365 Mich 360, 363-364; 112 NW2d 509 (1961).

plaintiff court's agents in their efforts to induce the counties to provide the requested appropriations.

On March 25, 2003, plaintiff court moved for summary disposition of the Counties' defensive counterclaims, and also moved pursuant to MCR 2.114 to impose sanctions on the Counties' counsel for alleging claims of fraud without a factual basis. The lower court in a May 30, 2003 Opinion and Order granted plaintiff's motion to strike the fraud allegations, and granted, in part the motion for sanctions, stating:

> IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff's motion for sanctions be, and the same hereby is, GRANTED in part. The law firm of Cohl, Stoker, Toskey and McGlinchey, PC, is to pay to counsel representing the Plaintiff all fees and expenses incurred by them in defense of the allegation that the Plaintiff misrepresented the anticipated cost of the retiree health care fund at issue in these cases.

Thus, sanctions were imposed on appellant law firm solely for that portion of the fraud defense that related to retiree health care. The trial judge reasoned that:

> Crawford County knew that the figures given to it by the Trial Court were incorrect, and the law has long been that "[a] fraud is not perpetrated upon one who has full knowledge to the contrary of a representation." *Montgomery Ward & Co v Williams, supra.* Therefore, Crawford and Kalkaska Counties should never have filed that claim, MCR

> 2.114(D)(2), which, in turn, means that the Trial Court is entitled to sanctions.

(5/30/03 Order and Opinion, p. 21). The Court of Appeals affirmed on grounds that one or more commissioners out of seven total (unspecified by the Court of Appeals) knew the Plaintiff's figures were false (Appendix 1, p. 19). Counsel for Crawford and Kalkaska, however, had no reason to disbelieve all commissioners' denials of actual knowledge at the time the fraud defense was raised, and to this day have seen nothing to demonstrate that a majority of Crawford commissioners had actual knowledge on August 29, 2000 that the cost figures plaintiff's agent repeatedly assured them had been verified as accurate were false.

The same May 30, 2003 Opinion and Order of the trial court expressly rejected the motion for sanctions with regard to the fraud claims as to the B-4 pension plan enhancement, on the theory that, while the fraud claims were without merit, there was nonetheless a good faith basis for claims of fraud as to non-disclosure of actuarial studies by plaintiff court. (*Id.*, pp. 21-22). With respect to the pension fraud claims, the Counties alleged that, notwithstanding that Kalkaska and Crawford specifically requested[3], consistent with the

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3 There are at least five (5) instances cited in the October 10, 2000 minutes in which Kalkaska made such inquiry (Appendix 8); and significantly more instances in which Crawford requested a MERS actuarial. Specifically, the plaintiff court represented to Crawford that "Rudi [Edel] was coming up with figures like fifteen grand, or something, and the Court doesn't have that kind of money..."; (See Appendix 5, p 15, 63; see, to like effect, Plaintiff's reiteration that no actuarial had been

requirements of MERS, whether the Court had obtained and would provide actuarials, the Court repeatedly misrepresented that no actuarials had been performed:

> **"Neither the court nor the control unit requested the actuarial study you mentioned in your letter. At this time there are no plans to make such a request."** (Appendix 12, 1/3/2001 Rudi Edel correspondence to Paul Compo)

Yet, the record demonstrated that the Court's Administrator Rudi Edel had "filed" in his office drawer nine (9) MERS actuarial studies sought by the plaintiff court, which, based upon the employee census provided by the Court Administrator, reflected that the cost of the proposed MERS B-4 Plan would vary between **16%** and **21%** of payroll as opposed to the 8.6% represented by the Plaintiff Court. (Appendix 21, Edel Dep, pp 92, 96; and Appendix 13).

B. Plaintiff's Misrepresentations Regarding The Proposed Retiree Healthcare Plan

The Counties in their counter-complaint alleged that, at the time plaintiff court made its Retiree Healthcare Proposal, it misrepresented the total cost, the counties' potential liability for any shortfall if Plaintiff's projections that future premium increases would be no more than 4% annually proved optimistic, and that its Retiree Healthcare Plan would

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requested by the Plaintiff at Appendix 12; Corlew Dep, Appendix 22, p 92).

be "self sustaining" at least to the year 2017. The counter-complaint charged that plaintiff provided the Counties with contrived, misleading, inaccurate and wholly unrealistic cost projections, based upon economic "assumptions" which were either false and deliberately misleading, or at best grossly inaccurate.

Discovery established that not only were these allegations pleaded in good-faith, they were true[4]. The $4,087 retiree health insurance base premium figure and 4% projected annual increase prominently featured in plaintiff court's presentation to Crawford County were certified by Mr. Edel as correct and reliable just 5 days after he had prepared for internal circulation a report based on an initial insurance premium of $6,178, and using an annual projected premium escalator of 12.5%. (Appendix 2)

On August 24, 2000, Court Administrator Edel

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[4] Remarkably, the lower court struck the fraud claims because there was so much evidence of fraud! Judge Kolenda reasoned that because Crawford knew some representations by plaintiff were false, such "knowledge provides too much notice to be ignored. . . . [O]nce [a party] knows that inaccurate representations have been made, it must be cautious and check the rest of what it is told." (5/30/03 Order and Opinion, p. 18). Such reasoning runs directly afoul of the rule that a fraud victim has no obligation or burden of due diligence, and one who knowingly propagates false information cannot accuse his victims of failure to discover the falsehood by resort to better informed sources. *Groening v Opsata*, 323 Mich 73, 80; 34 NW2d 560 (1948).

dispatched a memorandum to Judges Davis and Hunter, summarizing his conversations with various county commissioners and officials, and including his own comments and cost projections regarding the retiree healthcare fund. (Appendix 2) The memo is replete with references to then-current PPO-1 retiree health insurance premium as of August, 2000, *i.e.* $6,178. Under the section entitled "My comments" the Administrator states:

> b. When you retire, if you are married, you get $6200 annually toward payment of the court's BCBS health system; $3200 annually if single. If you don't take the court's health system you do not get this payment. However, you can go onto the court's health system after retirement if you met the minimum qualifications. (Current rates are $6,178 for $5.00 RX card, employee and spouse) (emphasis supplied)

(Appendix 2)

That memo has eight (8) spreadsheets attached, all of which reference the correct health insurance premium of $6,200.00. Yet, looking back at the "My comments" section, Court Administrator Edel notes a problem with the fund and his projections:

> 1. Looking at the spreadsheets, if we continue to use the 'premium costs' as the debit to the fund, we will go broke before 50% of the personnel reach retirement.

This problem of the fund going broke so soon was especially disconcerting to the Court Administrator,

considering his conversation with the Crawford's Controller, noted in the memo:

1st meeting with Paul Compo:

2. He wants to make this go and will support it if we can keep it in the black.

3. Commissioners will not support it unless in black.

(Appendix 2)

Despite Mr. Edel's recognition that the actual base insurance premium for plaintiff's health care plan was then $6178 per family unit (employee and spouse), the very next day he sent correspondence to Crawford Controller Compo with vastly different cost projections, stating:

> Paul: After talking with you yesterday I discussed the issue with Lanny Chard to get a better understanding as to how he calculated the Retirement Health Fund's solvency. This spreadsheet is the result of that meeting with him. **The Court agrees with his conclusions.** (emphasis supplied)

The attached spreadsheet utilized a base insurance premium of $4,087, 34% less than the correct rate which formed the basis of Edel's internal court memorandum of the day before. Further, the spreadsheet presented to Mr. Compo relied on a 4% annual premium increase, whereas Mr. Edel's internal

memo utilized a more realistic figure of 12.5%[5].

Further compounding these misrepresentations, plaintiff court again offered the incorrect and unrealistic financial projections to the entire Crawford County Board of Commissioners on August 29, 2000. Certain Crawford commissioners were skeptical of Plaintiff's projections but, assured by Mr. Edel of their validity, Crawford adopted a Resolution in strict conformity with the representations made by the court (Appendix 4, p 3).

Immediately upon learning that Crawford had evaded the trap laid for it by expressly linking its approval to the false projections used by plaintiff to sell its plan, Chief Judge Davis telephoned the Crawford Board's Chair, and apprised her that there had been an "arithmetic" error. On September 6, 2000, Judge Davis offered Crawford a proposed written "contract" agreeing to provide both desired benefits, with retiree health care now included on financially realistic terms. Crawford,

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[5] Since Edel's projections extended to the year 2017, the difference between 4% per year increases and 12.5% is staggering—an 87.30% cumulative increase versus 558.33%! Starting with the understated $4,087 premium figure, that results in a "final" projected cost of $7,842.25 per retiree unit (employee and spouse). If one begins with the $6,178 initial premium, and uses the realistic inflation rate for healthcare costs, the projected final cost soars to $40,517.36. As Edel was telling the counties that, collectively, they could fund the entire cost of the retiree health care plan for $50,000 in the first year (of which Crawford would pay 24%, Kalkaska 32%, and Otsego 44%), increasing at 4% to $93,650 in 2017, the expectation of solvency is seen to be a pipe dream.

however, refused to approve the "contract," and correlatively refused to remove the conditions underlying its August 29 resolution, and eventually rescinded that resolution (Appendix 11).

C. Crawford And Kalkaska's Actual Reliance On Plaintiff's Misrepresentations

Judge Kolenda based his sanctions ruling on the premise that certain Crawford Commissioners and the Controller *knew* the misrepresentations from the Plaintiff concerning the costs of the retiree health care plan were false, reasoning that there could be no fraud, because fraud requires reliance.

With respect to the Controller's claimed "knowledge," Plaintiff and the lower court both relied on a December 14, 2001 letter from Crawford Controller Paul Compo to Peter Cohl of Cohl, Stoker, Toskey & McGlinchey, P.C., the appellant law firm. The manner in which plaintiff court acquired this letter is not clear, but Crawford has claimed (and the Court of Appeals agreed) the letter is subject to attorney-client privilege, a subject addressed *infra* as Issue III of the Argument section. The lower court overruled the claim of privilege, finding a purported waiver, and then relied on the contents of the document to find that Mr. Compo had "actual knowledge" of plaintiff's health care fraud prior to August 29, 2000, as a prelude to applying the law of agency to attribute such "knowledge" to the Crawford Board:

> "...when the Crawford County Board adopted its resolution agreeing to a healthcare fund with a benefit cap of $4,087.00 for the first year, plus 4% thereafter, it, in the person of its controller and some its members knew that the cap had to be $5,763.00 to be feasible and that

> annual increases would likely be greater. As a matter of common sense, practicality, and fairness, the law has long held that, when one side of a negotiation knows that a proposed term carries a meaning different than appears on its face, acceptance is acceptance of the proposal as actually understood, not as verbalized."

(5/30/03 Order and Opinion, p 12)

A review of the minutes and transcript of the Aug. 29, 2000 meeting of Crawford's Commissioners illustrates that some Crawford commissioners and the controller did no more than harbor doubts as to the correctness of the figures promoted by Judge Davis for health care costs. (See, generally, Appendix 4 and 5) Moreover, to assuage such doubts, Court Administrator Edel sent Mr. Compo a letter reassuring him and the Crawford Board that plaintiff's projections were realistic and accurate. (Appendix 3)

Further, as vigorously as plaintiff tried to prove certain Crawford Commissioners "knew" Judge Davis' and Rudi Edel's representations were untrue, it failed to obtain testimony from any Crawford Commissioner to that effect. Although Crawford Commissioners Scott Hanson and Elizabeth Wieland admitted they had doubts regarding the accuracy of the Court's representations at the time of the August 29, 2000 Board meeting (See generally, Appendix 5), they never said that they "knew" the representations were actually false. Thus, only 2 of 7 Crawford Commissioners ever suggested that they were even suspicious of the court's representations.

Chairperson Corlew questioned plaintiff's projections, but was assured by Judge Davis as to the veracity of the representations (Appendix 22, p 86):

> A. It was at the meeting or one very close to that where I asked him (Judge Davis) what are you going to do if you find out that the information that you have been given by your staff is inaccurate?
> Q. That's when he said that heads will roll[6]?
> A. Correct ...
> Q. Did he (Judge Davis) – seem to be believing the numbers he was laying out to you?
> A. Yes.

Commissioners expressly relied on the accuracy of the information provided by Judge Davis, placing their trust in his judicial status:

> Whenever I talked to Judge Davis and I asked him a question, he's always answered it very forthright and - - I don't know. I can't tell you if it was the truth or not. I took it as the truth.

(*Id.*, p 34).

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6 That was another falsehood. Rudi Edel remains employed as the court administrator. The only parties to suffer from his fraudulent representations are Crawford, Kalkaska, and their legal counsel, for having been put in the position of asserting that "the emperor has no clothes."

There is no question that Kalkaska likewise relied upon plaintiff court's cost projections in initially accepting the Retiree Health Plan (1/28/03 Cox Dep, Ex 9 to 4/23/03 answer to MSD, p. 44; 2/14/03 McCully dep, Ex 23 to 4/23/03 Answer to MSD, pp. 30-31; 3/4/03 Needham dep., Ex 24 to 4/23/03 Answer to MSD, pp. 33-34).

Additional facts will be adduced as pertinent to specific issues and arguments.

III. ARGUMENT

Issue I. The Pleading of the Defense of Fraud Was Not Frivolous, And The Lower Court Erred In Sanctioning Counsel For Having Raised The Defense.

Standard of Review

Appellate review of a decision to impose sanctions is for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). Note that in *Kitchen*, the Court nonetheless reversed based on an independent *de novo* determination that there was enough arguable merit to avoid sanctions for frivolous pleading. 465 Mich at 662. The clear error standard thus applies *only* to factual determinations—here, there have been no factual determinations, because no evidentiary hearings on the issue have been held, all rulings being summary.

The application of law to fact is an issue of law also reviewed *de novo*. *Centennial Health Care Mgmt Corp v Mich Dep't of Consumer & Industry Services*, 254 Mich App 275, 285; 657 NW2d 746 (2002), citing *Schroeder v Detroit*, 221 Mich App

364, 366; 561 NW2d 497 (1997). In *Miller v Wokas*, 468 Mich 882; 661 NW2d 231 (2003)[7], the Court applied *de novo* review in peremptorily reversing an award of sanctions. To the extent sanctions turns on the interpretation of a court rule, that presents a question of law also reviewed *de novo*. *Dessart v Burak*, 252 Mich App 490, 494; 652 NW2d 669 (2002).

Analysis

A. A Sufficient Good Faith Argument In Support Of The Fraud Claims Was Made To Preclude The Imposition Of Sanctions For "Frivolous Pleading."

Frivolousness for purposes of MCL 600.2591 or MCR 2.114(E) is determined as of the time a complaint is filed, *not* later. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003); *Meagher v Wayne State Univ, supra*, 222 Mich App at 727. The purpose of §2591 is "to sanction attorneys and litigants who file lawsuits or defenses without reasonable inquiry into the factual basis of a claim or defense, not to discipline those whose cases are complex or face an 'uphill fight.' " *Louya v Wm Beaumont Hosp*, 190 Mich App 151, 163-164; 475 NW2d 434 (1991). "That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry." *Jerico Constr, Inc v Quadrants, Inc, supra* at 36, citing *Lockhart v Lockhart*, 149 Mich App 10, 14-15; 385 NW2d 709 (1986). Therefore, the focus of review here must be on what counsel for Crawford and Kalkaska knew when the fraud defense was first raised, not what came to light later.

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[7] The decision is precedential. *People v Crall*, 444 Mich 463, 464 n. 8; 510 NW2d 182 (1993).

A good faith belief, or a good faith argument for a modification or extension of existing law, is sufficient to avoid sanctions. As held in *Kitchen v Kitchen, supra,* 465 Mich at 662:

> The issue whether plaintiffs should be subject to sanctions is much closer than the Court of Appeals made it appear. Although plaintiffs' claim for an irrevocable license must ultimately fail, plaintiffs presented a sufficient argument grounded in law and fact to avoid a finding of frivolity. The mere fact that plaintiffs did not ultimately prevail does not render the supplemental complaint frivolous.

The Court in *Kitchen* went on, *id.* at 663, to note that citing authority from another jurisdiction will suffice to avoid sanctions for a frivolous pleading:

> Plaintiffs point out accurately that there is support for their position in authorities from other jurisdictions and in the Restatement of Property. 5 Restatement Property, § 519(4). * * * Not every error in legal analysis constitutes a frivolous position. Moreover, merely because this Court concludes that a legal position asserted by a party should be rejected does not mean that the party was acting frivolously in advocating its position.

Kitchen also continues, *id.* at 663, importantly, by expressly noting that sanctions are properly reversed on appeal where a convincing argument is made by the sanctioned party, even if that analysis has been refined in comparison with that presented to the trial court:

> We recognize that plaintiffs' argument before this Court is more refined than that made before the trial court. [FN8 omitted] Nonetheless, we conclude that plaintiffs' initial allegations and legal argument were sufficient to avoid sanctions for a frivolous lawsuit. Thus, the circuit court clearly erred in its award of sanctions predicated on finding the suit frivolous.

And, as the Court of Appeals correctly recognized in *Stablein v Shuster*, 183 Mich App 477, 483; 455 NW2d 315 (1990):

> In this case, while plaintiffs' arguments fail, given the Supreme Court's opinion in *Rouch*, we hesitate to conclude that plaintiffs' claim does not represent a good faith argument for the extension or modification of existing law. MCR 2.114(D)(2).

The United States Supreme Court has similarly recognized that if a party can find any legal authority to support its position, or even argue merely that controlling authority in its own jurisdiction was wrongly decided, then its pleadings cannot be held to be frivolous. *McKnight v General Motors Corp*, 511 US 659, 660; 114 S Ct 1826; 128 L Ed 2d 655 (1994).

The standard warranting an award for sanctions under MCR 2.114(F) is:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or

injure prevailing party;

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true; or

(iii) The party's legal position was devoid of arguable legal merit.

MCL 600.2591 (emphasis added); See also *Szymanski v Brown*, 221 Mich App 423 (1997); *Meagher v Wayne State Univ*, 222 Mich App 700 (1997).

Here, the lower court has not concluded, nor is there any evidence for the proposition, that the "primary purpose was to harass, embarrass, or injure the prevailing party." Indeed, Judge Zahra on review expressly found no evidence of such a wrongful purpose (Appendix 1, p. 17), and his colleagues in the Court of Appeals' majority did not challenge his evaluation.

The lower court concluded in error that sanctions were justified in that, as to the Counties' defensive claims of fraud and misrepresentation with respect to the Retiree Health Plan, Defense Counsel should have appreciated that Crawford and Kalkaska were barred from claiming fraud based on supposed actual knowledge they had been given false cost projections, rendering the claim of fraud devoid of arguable legal merit (5/30/03 Order and Opinion, p. 21).

However, as already demonstrated, counsel for Crawford and Kalkaska knew only that a few commissioners and the Controller had harbored doubts about those cost projections, and were positioned to make a good faith argument, at least, that this was short of the level of "actual knowledge" that would defeat a defense of fraud to a contract

claim. Doubt, even suspicion, is not tantamount to the "actual knowledge" which defeats a fraud claim. *Bangor & A R Co v ICC (On Rehearing)*, 578 F2d 444, 445-446 (CA 1, 1978) (quoted below at p. 26); *Mattingly, Inc v Beatrice Foods, Co*, 835 F2d 1547, 1556 (CA 10, 1987). Accord: *Pan Am Petroleum Corp v Verde Oil Co*, 367 F2d 461, 464 (CA 5, 1966) (applying Texas law); *In re Grievance Committee of US District Court*, 847 F2d 57, 63 (CA 2, 1988). Defense counsel could hardly anticipate the lower court's contrary ruling so as to deprive their clients of the opportunity to even test such a defense; that portends the very chilling of vigorous advocacy that a sanctions regime must never cause. *Louya v Wm Beaumont Hosp, supra*, 190 Mich App at 163. Counsel's raising of the fraud defense was not "so unreasonable as to be devoid of arguable legal merit or otherwise frivolous." *Fechik v Delta Land Surveying & Engineering, Inc* (Mich App No. 251090, released Feb. 22, 2005), slip op. pp. 1, 2 (Attachment A per MCR 7.215(C)(1)). As sanctions were imposed solely for lack of factual support (Judge Kolenda expressly ruling that sanctions for lack of legal merit are not appropriate), sufficient evidentiary support for the defense existed, making the imposition of sanctions clearly erroneous. *Schreiner v Francis* (Mich App Nos. 252058; 255783, released Apr. 14, 2005, at Attachment B).

B. The Lower Court Erred In Sanctioning Counsel For Failure To Go Beyond The Information Supplied By The Clients In Order To Learn That Facts Claimed Were Untrue.

To sanction counsel on the theory that some members of the boards of commissioners and the controller did not merely suspect, but actually knew, to the requisite "evidential certainty," *Columbia Intern Corp v Perry, supra*, 54 Wash2d at 879; 344 P2d at 511, that the 46th Circuit Trial Court's cost

figures were inaccurate, without proof that, before filing the countercomplaint, *counsel* was aware of that information, is obviously erroneous. And, as the argument of Issue II demonstrates, even if counsel were in possession of that datum, a good faith argument that a claim of fraud is proper can nonetheless be made, because the Crawford Board of Commissioners, *as an entity*, lacked actual knowledge that the $4,087 figure was wrong and that $5,783 (or $6,178) was correct. Yet, the appellant law firm was sanctioned for defending the Counties who were sued by the plaintiff court, and even at this late date plaintiff has still not had to face similar condemnation for providing the misrepresented cost information to the Counties at the outset. Further, nowhere in the audio recordings of the Crawford Board of Commissioners August 29, 2000 meeting (which the circuit court ruled irrelevant), and certainly not in the official minutes, is there any statement acknowledging or suggesting that the numbers provided by plaintiff court in support of its appropriations request were *known* by the Crawford Board to be grossly incorrect.

The lower court, in imposing sanctions on counsel for defendants, gave no heed to the crucial principle of Michigan jurisprudence concerning a lawyer's conduct in representing a client in our adversarial system—a lawyer must represent the client zealously, MRPC 2.1, and *in doing so owes no duty of care to an opposing party*. *Friedman v Dozorc*, 412 Mich 1, 22-26; 312 NW2d 585 (1981). (To the contrary, the lower court opined that counsel should be especially careful before charging a court with fraud, thus giving the judiciary an unwarranted advantage in "inherent powers" litigation, a license to play fast and loose with the truth which is something available to no other litigant). Imposition of sanctions is always improper if it might chill an attorney's vigorous pursuit of his client's

rights. As the Court of Appeals said in *Louya v William Beaumont Hosp, supra,* 190 Mich App at 163:

> In our view, the statute at issue [MCL 600.2591] and the rules of professional conduct should be read in harmony, if possible, to avoid the anomalous result of holding a lawyer personally liable for an opponent's costs and attorney fees after ethically representing a client's interest.

Louya adds that "the mere fact that the attorney may doubt the possibility of success on the merits of a case, even at the outset of litigation, does not necessarily and logically lead to a conclusion that the claim is 'frivolous'", quoting the comment to MRPC 3.1 to the effect that

> "The filing of an action . . . for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer believes that the client's position ultimately will not prevail. *Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail.*" (Emphasis added by the Court).

Accord: *Pope v State Farm Mut Auto Ins Co* (Mich App No. 227893, April 9, 2002) (attached hereto as Attachment C).

To the extent either the credibility or weight of any "evidence" relied upon by the lower court is pertinent, defense counsel and the defendants were entitled to have a trial to resolve the weight and credibility of conflicting testimony,

People v Jackson, 390 Mich 621, 625 n. 2; 212 NW2d 918 (1973)[8].

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[8] The Supreme Court there summarized the long-standing rules on the subject:

> "The issue of credibility is to be resolved by the trier of fact. As stated in *Woodin v Durfee*, 46 Mich 424, 427, 9 NW 457, 458 (1881), 'a jury may disbelieve the most positive evidence, even when it stands uncontradicted.' Similarly, see *Crampton v Crampton*, 205 Mich 233, 241, 171 NW 457 (1919); *Cuttle v Concordia Mutual Fire Ins Co*, 295 Mich 514, 519, 295 NW 246 (1940); *Hughes v John Hancock Mutual Life Insurance Co*, 351 Mich 302, 308, 88 NW2d 557 (1958); *Baumgartner v Ham*, 374 Mich 169, 174, 132 NW2d 159 (1965); *Wolfgram v Valko*, 375 Mich 421, 435, 134 NW2d 649 (1965).
>
> "Even in a case where there is no issue of credibility and no showing of interest on the part of the witnesses, the question does not become one of law and still is to be decided by the trier of fact where the evidence relied on is contradicted 'by any testimony given in the case * * * or by any facts or circumstances in the case,' or where the evidence relied on is 'in any way improbable or discredited' or any legitimate inference may be drawn inconsistent with a finding or verdict directed as a matter of law.

Indeed, even considering the letter of Paul Compo as admissible evidence, the contrary affidavits of Crawford commissioners create a triable issue of fact. *Braman v Bosworth, supra,* 112 Mich App at 522. Counsel would have acted unethically had they abandoned their clients or refused to press the clients' case merely on the basis that one employee's understanding of certain information was at odds with that of other witnesses (especially when those "other witnesses" were the actual decisionmakers), see MRPC 1.16, and counsel could hardly be required to anticipate how the lower court would view disputed facts.

The lower court further erroneously opined, citing no authority (Jan. 7, 2004 opinion, p. 9), that counsel for Crawford and Kalkaska had "an obligation to counsel their clients—to quiz them about their allegations and to vet those allegations." That reflects a gross misapprehension of the role of a trial lawyer. The lawyer's job is to present the client's position as forcefully as possible, and **if contradictory evidence exists, its weight and credibility is for the trier of fact to determine, not the advocate**. Attorneys are not tasked by MCR 2.114 to prognosticate what a trier of fact might do with conflicting proofs, on pain of paying the other party's attorney fees if they fail to predict the outcome correctly. Nor are attorneys tasked to function as "human lie detectors," a role Michigan

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Boudeman v Arnold, 200 Mich 162, 164, 166 NW 985, 986, 8 ALR 789 (1918). Similarly, see *Hagan v Chicago, D & CGTJR Co*, 86 Mich 615, 49 NW 509 (1891); *Kaminski v Grand Trunk WR Co*, 347 Mich 417, 428, 9 NW2d 899 (1956); *Green v Detroit UR*, 210 Mich 119, 125, 177 NW 263 (1920)."

jurisprudence flatly refuses to recognize for anyone. *People v Smith*, 428 Mich 98, 109, 113; 387 NW2d 814 (1986); *People v Graham*, 173 Mich App 473, 478; 434 NW2d 165 (1988).

Under MCR 2.114(D) and (E), an attorney must conduct a reasonable investigation into the legal and factual viability of a pleading before it is signed. "Viability" focuses on whether an arguable case can be made on the facts and/or law, not on the truth or relative weight of favorable evidence (including the statements of clients, or members of a legislative body that is a client) as against countervailing proofs or arguments. *Louya v Wm Beaumont Hosp, supra*, 190 Mich App at 157, 160 ff.

This point is made pellucidly clear by the Second Circuit's opinion in *In re Grievance Committee of US District Court, supra*, 847 F2d at 63, where it was addressing a disciplinary complaint against an attorney based on failure to disclose to a court knowledge that a witness was committing perjury (emphasis added):

> To interpret the rule to mean otherwise would be to require attorneys to disclose mere suspicions of fraud which are based upon incomplete information or information which may fall short of clearly establishing the existence of a fraud. We do not suggest, however, that by requiring that the attorney have actual knowledge of a fraud before he is bound to disclose it, he must wait until he has proof beyond a moral certainty that fraud has been committed. **Rather, we simply conclude that he must clearly know, rather than suspect, that a fraud on the court has been**

committed before he brings this knowledge to the court's attention.

Applying the above to the instant appeal, it becomes clear that Doe did not violate his ethical duties when he did not report to the court the information he possessed concerning witness's potential perjury. Neither the information Doe received from conversations one and two, nor his independent information concerning the facts of the case, provided him with knowledge that a fraud on the court had taken place. Although Doe's subjective beliefs may have caused him to suspect strongly that witness lied, they did not amount to actual knowledge that witness committed a fraud on the court.

CONCLUSION

We must always be mindful that the perspective of a judge differs greatly than that of the practicing attorney. "From the perspective of [a] ... judge, ... a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel." *Nix v Whiteside*, 475 US 157, 190, 106 SCt 988, 1007, 89 LEd2d 123 (1986) (Stevens, J., concurring in the judgment). Here, an attorney's reputation was put in question because he failed to report his suspicion that an

> adverse witness lied. As Judge Zampano recognized after he conducted the special hearing, the proper forum for resolving that question is not a collateral proceeding, but is the trial itself. Determining credibility is unquestionably the hallmark of the adversarial system. **By awaiting trial, armed with his beliefs concerning witness's veracity and ready to impeach witness's credibility, Doe acted in a manner consistent with the traditional role of a trial lawyer.** We therefore conclude that Doe violated no ethical duty by not reporting his suspicions to the court.
>
> In view of the foregoing, we reverse the district court's order suspending Doe from practice.

Thus, the lower court simply failed to recognize that the task of trial counsel is limited. Attorneys have no obligation to function as a filter for the trier of fact, but may present evidence in furtherance of their clients' interests, even though they know it may or will be contradicted, leaving it to the trial itself (and the trier of fact) to weigh and evaluate the conflicting evidence. **A trier of fact may rely on whatever version of facts is testified to by a witness at trial, even if the witness previously made contradictory statements.** *Gabrish v Morse*, 361 Mich 39, 43 ff; 104 NW2d 757 (1960). Moreover, an individual party is not bound even by their own testimony, but may adduce other competent, contradictory evidence, and it thereby becomes a matter for the trier of fact to resolve. *Braman v Bosworth, supra*, 112 Mich App at 522.

To sanction lawyers who proceed on the basis of evidence in hand, irrespective of other evidence, or without ascertaining whether contrary evidence exists, stands the trial process on its head (or vitiates it entirely), recasting the role of lawyer from advocate to inquisitor, or worse.

Issue II. The Lower Court Erred in Summarily Dismissing the Defenses of Fraud and Silent Fraud.

Standard of Review

The lower court granted the 46th Trial Court's motion for summary disposition as to the defense of fraud pursuant to MCR 2.116(C)(10), no genuine issue of material fact. A motion brought under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Both trial and appellate courts must review the pleadings, affidavits, depositions, and any other documentary evidence in a light most favorable to the nonmoving party. *Id.* "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.* Appellate review is *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

It is error to make any finding of fact on a motion for summary disposition if there is conflicting evidence. *Hubscher & Son v Storey*, 238 Mich App 478, 482; 578 NW2d 701 (1998). **Even where the trial judge may function as trier of fact at any trial, it is reversible error to anticipate that role and to make any findings on a motion for summary disposition.** *Reed v Kaydon Engineering Corp*, 38 Mich App 353, 356-357; 196 NW2d 487 (1972). In determining whether a material issue of

fact as to fraud exists, the facts must be viewed in a light "as strongly as possible in favor of" the party claiming fraud, *Groening v Opsata, supra*, 323 Mich at 79.

Analysis

A. The Lower Court Erred In Attributing Supposed Knowledge Of An Agent (Of Only Crawford County) To The Crawford County Board of Commissioners, Where No Transaction Was Consummated By Crawford County Through An Agent.

1. The Doctrine That Knowledge Of The Agent Is Knowledge Of The Principal Only Applies To Transactions Consummated Through An Agent.

In summarily dismissing the affirmative defense of fraud[9], the lower court reasoned (May 30, 2003 opinion, p 18) that because Crawford's controller and some members of its Board of Commissioners had supposed actual knowledge (in reality, at most mere suspicions) that the cost of Crawford's own healthcare plan was $5,763 per employee per year, (not the $4,087 cost per court employee as represented at the August 29, 2000 Board meeting) such knowledge precludes a claim of fraud in the inducement. The lower court cited *USF&G v Black*, 412 Mich 99, 126; 313 NW2d 77 (1981), *Chelsea Associates v Rapanos*, 527 F2d 1266, 1269, 1273 (CA 6, 1975), and

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[9]Appellant counties agree with the Court of Appeals that the fraud pleaded in the counterclaim is correctly understood as being in the nature of an affirmative defense. *USF&G v Black*, 412 Mich 99, 119 ff; 313 NW2d 77 (1981).

Montgomery Ward & Co v Williams, 330 Mich 275, 284; 47 NW2d 607 (1951), as supporting its reasoning.

It is true that in the *USF&G Case*, 412 Mich at 126, the Supreme Court held that knowledge of an agent is knowledge of the principal. **But that doctrine from the law of agency only applies when the principal seeks to avoid a transaction consummated through an agent.** In the *USF&G Case* itself, the principal, USF&G, sought to avoid liability on a bond issued and signed by its agents, Montie and Neubacher, under a power of attorney. 412 Mich at 109. Here, the supposed agent, Crawford Controller Paul Compo, entered into no transaction with the 46th Trial Court on behalf of Crawford; only the Crawford County Board of Commissioners—of which Mr. Compo is not a member—could make or is alleged to have made a contract with plaintiff.

Meanwhile, applying such agency principles to government bodies, without limitation to transactions consummated through agents, is contrary to law and common sense. Similarly, skepticism or knowledge of one member of the board of commissioners is not knowledge of the board of commissioners itself. There is a distinction between the individuals making up a board of commissioners and the board itself, which has significant legal ramifications. *Rasch v City of East Lansing*, 141 Mich App 336, 345; 367 NW2d 856 (1985) (action of one member of a city council did not bind the city); *Gean v Hattaway*, 330 F3d 758, 765 ff (CA 6, 2003) (for federal law purposes, including Eleventh Amendment immunity and federal jurisdiction, there is an important distinction between the individual capacity of a government agent and the agent's official capacity). There simply was no *conclusive* evidence that, as a body, the Crawford County Board of Commissioners had actual knowledge of the falsity

of plaintiff court's cost projections.

2. The Lower Court Relied On Inadmissible Evidence, In Violation of Attorney-Client Privilege, In Determining That Crawford County's Controller Had Actual Knowledge Of The Claimed Fraudulent Representation.

For the reasons adduced in issue III addressing the attorney-client privileged document, the lower court erred in considering such inadmissible evidence in deciding a motion for summary disposition under MCR 2.116(C)(10). Only admissible evidence may be considered. MCR 2.116(G)(6).

B. Whatever Was "Known" To the Crawford County Controller Fell Short Of "Actual Knowledge" Of A False Representation.

The lower court knew from its review of the minutes and the tape recording of the August 29, 2000 meeting of the Crawford Board of Commissioners that the County Controller, Paul Compo, did no more than harbor doubts as to the correctness of the figures promoted by Court Administrator Rudi Edel for health care costs. Further, the lower court was presented with the fact that plaintiff court, in response to such skepticism, assured the Controller that the figures were, in fact, accurate. (Appendix 3) **Suspicion that information is faulty and actual knowledge of falsity are by no means the same thing.** *Cartmell v Slavik Co*, 68 Mich App 202, 205-206; 242 NW2d 66 (1976) (knowledge that a roof leaked was not equivalent to actual knowledge that the leaks were the product of faulty workmanship, even in a situation where what the plaintiffs should have known would be enough to bar their

cause of action[10]). Indeed, anyone who has ever bought a commercial airline ticket knows that the price they paid for a ticket is probably higher or lower than that paid by most other passengers on the plane; similarly, different insurers may quote different prices for seemingly similar or even identical health insurance coverage.

Here, the plaintiff court had misrepresented to Crawford that by converting to a PPO-1 with a $10 prescription drug co-pay (from the prior $2 co-pay), offsetting savings would be generated sufficient to maintain the solvency of the proposed retiree healthcare fund. (See generally, Appendix 5) Neither the Crawford Controller nor any member of the Crawford Board of Commissioners knew for a

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[10] As conclusively shown below, *Groening v Opsata, supra*, 323 Mich at 80; *Phinney v Perlmutter*, 222 Mich App 513, 534-537; 564 NW2d 532 (1997), **the law of Michigan as to fraud is that "should have known" is irrelevant; victims of fraud are not held to any standard of diligence or due care to avoid being victimized.** Here, where defendant Counties are legally entitled to rely on Judge Davis or his representatives to provide them with truthful information, MCJC 2A, and given the legal relationship between the 46th Circuit Trial Court and the county boards of commissioners, Crawford and Kalkaska were entitled to rely on the figures supplied by plaintiff court's agents without conducting any independent investigation or evaluation. *Rutherford v Rideout Bank*, 11 Cal2d 479; 80 P2d 978; 117 ALR 383 (1938), as summarized with approval in *Madison Nat Bank v Lipin*, 57 Mich App 706, 723; 226 NW2d 834 (1975).

fact—whatever they suspected—that Judge Davis or Court Administrator Edel had not found an insurance plan with a more favorable rate than those with which they were familiar.

When Judge Davis' cost figures were challenged, he or his Court Administrator assured the Boards of Commissioners of the correctness of their numbers, and otherwise stonewalled and fobbed off all inquiries.[11] Thus, this case is indistinguishable from *Bangor & A R Co v ICC (On Rehearing), supra*, 578 F2d at 445-446, where the First Circuit rejected an attempt to equate grave suspicion of false representations with actual knowledge, reasoning (emphasis supplied):

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11 The continued assurances pertaining to the proposed benefit increases are amazing considering Judge Davis' own testimony regarding his lack of efforts to investigate the potential cost of the benefits (Judge Davis June 11, 2003 Deposition, pp 20-21 at Appendix 20):

> "I never investigated anything....I simply said the time is right in my judgment to say to the commissioners **we want a better pension plan and by better I want the best there is** and I want it uniformly across the board. It was that simple. I didn't do another thing."

Judge Davis dispatched representatives to sell his desires to the Board of Commissioners, insouciant as to whether they investigated costs or provided false reassurances as to costs. The representatives understood their task as gaining approval of the enhanced benefits, the end justifying whatever means they might employ.

* * * We start by pointing out that the evidence, in its totality, is not so conclusive of MEC's "actual knowledge" as BAR would have it. The evidence is equally indicative of MEC's holding mere suspicions about BAR-CP activity, fired by rumor and BAR's waffling in the face of pointed interrogation by MEC suspicions held despite BAR and CP's concurrent obfuscation of their plan.

For example, MEC President Miller's memorandum of a conversation he had with Dumaine on July 2, 1970, shows that Dumaine described BAR's "reported arrangement" with CP variously * * * . Dumaine also said the alleged contract had not yet been finalized * * * . Dumaine "further indicated, in view of what (Miller) said, that there was some doubt if the Montreal agreement would ever be finalized." Dumaine did disclose to Miller, when pushed, the general terms of at least one version of the proposed arrangement. (He expressed the financial agreement between BAR and CP in different ways at different points in the conversation.) But Dumaine did not respond to Miller's request to see the agreement, and put Miller off generally with regard to the agreement's status and future, *i. e.*, whether it would be put into effect. Yet by this time, July 2, an agreement in principle had been reached, and the solicitation efforts of both BAR and CP had begun.

This evasive approach typified BAR's response to MEC's other inquiries. As we noted in the opinion, early in 1970 the president of BAR wrote the president of MEC that "(i)t has never been the policy of this company to solicit routings from the Great Northern Paper Company or other customers, and we have no intention of changing that policy."

This was written when negotiations between BAR and CP were already in progress. Requests by MEC that BAR or CP disclose the arrangement went unheeded by BAR. * * * Miller's statement, in his letter of September, 1970, to Great Northern, **evinces MEC's awareness that "it is no secret that Mr. Dumaine entered into a little hanky- panky with the Canadian Pacific * * * ," but at the same time it sets forth again, albeit skeptically, BAR's disingenuous responses** that car supply and service considerations motivated and warranted the arrangements. * * *

Evasive and misleading responses of this sort by the defendants were not a factor in *Cook*. The *Cook* investors made feeble inquiry of those who had defrauded them on a single occasion over six months after serious financial reverses were manifest. It was not contended that they were then misled or lulled. **In the case at bar, MEC made diligent inquiry. Although it unearthed some knowledge, it could be found**

> **to have been impeded by BAR's evasions from arriving at a full appreciation of the true scope and character of BAR's plan until disclosure of the agreement in 1972.** [FN3 omitted] We do not sympathize with BAR when it argues that MEC should be charged with knowledge notwithstanding BAR's deliberate concealment.

In a similar vein, the Tenth Circuit has opined (emphasis added):

> In Kansas, " '[d]iscovery of the fraud' has been defined ... to mean the time of actual discovery or when, with reasonable diligence, the fraud could have been discovered." *Augusta Bank & Trust v Broomfield*, 231 Kan 52, 643 P2d 100, 108 (1982). Nevertheless:
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> It ... [implies] actual knowledge, not mere suspicion of wrong. Further, **even though his suspicions might have been aroused a party may be lulled into confidence by certain representations and forego any further investigation.** *Id.*

Mattingly, Inc v Beatrice Foods, Co, supra, 835 F2d at 1556. Accord: *Pan Am Petroleum Corp v Verde Oil Co, supra*, 367 F2d at 464 (applying Texas law); to like effect see *In re Grievance Committee of US District Court, supra*, 847 F2d at 63. To warrant summary disposition, supposed "actual knowledge" must be of "evidential facts" leading to a belief that fraud has occurred. *Columbia Intern Corp v Perry*, 54 Wash2d 876, 879; 344 P2d 509, 511 (1959).

Here, in fact, when Crawford's Controller questioned the rate used by the Court Administrator, he was expressly assured in writing that the various cost figures propounded by Mr. Edel were correct. (Appendix 3) There was nothing on the face of the communications from the 46th Circuit Trial Court's representatives that established that the cost figures therein presented were necessarily false, without which the Crawford Board of Commissioners were entitled to and did in fact rely on them. See *McIntosh v Detroit Sav Bank*, 247 Mich 10, 14; 225 NW 628 (1929) (if there is nothing on the face of commercial paper to cast suspicion on its character, it can be impeached in the hands of a holder for value only by evidence of the holder's bad faith). It is unfathomable how the Crawford Controller could be charged with actual knowledge of falsity, when the 46th Circuit Trial Court Administrator specifically assured him the suspect figures had been investigated and found to be correct. (See Appendix 2). At a minimum, a triable issue of fact bars summary disposition. Indeed, **even if Mr. Compo's letter is admissible and constitutes actual knowledge of falsity, it is merely evidence; the contrary affidavits of the Crawford commissioners (the actual decision makers) would also have to be weighed by a trier of fact.** *Braman v Bosworth, supra*, 112 Mich App at 522.

Since it is clear that the commissioners, collectively as an entity, did not know *for a fact* that Plaintiff's $4,087 figure was false, but at most merely questioned the wisdom of its use, reliance is not precluded. **Only actual, *but not reasonable*, reliance on a misrepresentation is required as an element of fraud.** *Groening v Opsata, supra; Phinney v Perlmutter, supra* at 534-537. On the face of Crawford's resolution, such reliance is clearly evident. (Appendix 4, p 3). At the least, a triable issue of fact as to reliance exists. *Biscayne Corner Deli & Bakery East, LLC v MC Office Investments, LLC*, 472 Mich 892; 695 NW2d 69

(2005).

C. The Lower Court Erred In Finding No Triable Issue Of Fact As to Fraud.

An innocent misrepresentation is actionable even if it was not the sole cause inducing the recipient to enter into a disadvantageous bargain; all that is required is proof that the falsehood induced a material level of reliance. *USF&G v Black, supra,* 412 Mich at 121. The situation here is the more egregious because Judge Davis, as a public official and as a judge governed by MCJC 2A, stood in a confidential relationship to his funding units and, irrespective of whether that relationship could be characterized as fiduciary, the boards of commissioners were entitled to repose trust and confidence in Judge Davis, and to rely on him for a full and truthful statement of all facts. *Hyma v Lee,* 338 Mich 31, 39-40; 60 NW2d 920 (1953). The terms of Crawford's August 29, 2000 resolution, **which expressly incorporate the $4,087 figure, conclusively demonstrate material reliance**—all the more so as the lower court, by misinterpreting and misapplying *Biltmore Land Co v Estate of Munro,* 271 Mich 125, 129 (1935) and *Ardis v Grand Rapids & I R Co,* 200 Mich 400, 414 (1918)[12],

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[12] Both cases stand for the unremarkable proposition that when two parties contract, and one makes clear to the other how a particular provision is understood by that party, that interpretation controls. That concept has no application to this case; the resolution at issue expressly states that Crawford approves the health care plan only at a certain annual cost. That turns out not to be the actual cost, which is higher. Therefore, the approval is nugatory; *Biltmore* and *Ardis* provide no authority for ignoring a party's contemporaneously expressed limitations on its agreement to terms. See *Michigan Coal Co*

declared that such express reliance and limitation is to be magically read out of the actual resolution. Where there is any doubt as to such reliance, a triable issue of fact arises.

Here, Judge Davis or his representatives had special knowledge, giving them a decided advantage over the Boards of Commissioners, which necessarily relied on their representations; they had a right to so rely under the circumstances. *Hayes Const Co v Silverthorn*, 343 Mich 421, 426-427; 72 NW2d 190 (1955).

This case is thus similar to *Gregg v Transportation Workers of America*, 343 F3d 833 (CA 6, 2003), where the Sixth Circuit found fraud and breach of fiduciary duty in connection with a union's promotion and adoption of a group life insurance plan. Rejecting the argument that diligent pursuit of information contrary to that given by the fiduciary would have revealed the latent difficulties in the program, and thus that the correct information was there for all to see, the Sixth Circuit took a dim view of such reasoning, opining, 343 F3d at 844:

> Defendants make two arguments. First, Defendants argue that all of the relevant

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v Clarkson Coal & Dock Co, 266 F 189, 194 (CA 6, 1920). What the lower court actually ruled, therefore, is that when Judge Davis said $4,087 he meant $5,783 or $6,178, and that Crawford County's Board of Commissioners so understood, even though they had never seen or heard the latter number in any of the discussions leading to their resolution, which instead expressly referenced the $4,087 figure. See Corbin on Contracts, §544.

> information "was contained in the Group Master Policy, available to the union members for the asking." (Defendants' Brief at 14) Although each individual policyholder's certificate explained the insured's right to inspect the Group Master Policy during normal business hours, this does not constitute "disclosure" in any meaningful sense because Transamerica kept its copy in New York and TWU retained the union's copy in Dallas. (JA at 358.) When deposed by Defendants' counsel, Paul Winkler complained:
>
> * * *
>
> A fiduciary has not satisfied his responsibilities by disseminating information in a manner not reasonably calculated to reach beneficiaries.

Here, Judge Davis and Mr. Edel utilized the $4,087 figure without qualification, until ***after*** the Crawford Board of Commissioners acted on the basis of their original information. Irrespective of whether one Crawford commissioner, or its Controller, questioned the wisdom of Judge Davis' or Mr. Edel's choice of financial figures as unduly optimistic or even that they might be incorrect, no one else could or did *know for certain* that the number was utterly false.

Merely because one or more Crawford commissioners knew that the cost of group healthcare coverage from Crawford's existing insurer for county employees in certain classifications was $5,783 per person is hardly equivalent to knowledge that the same or another insurer would never quote a lower rate to another employer, *i.e.* the 46th Circuit

Trial Court, for employees in other classifications—especially where that plan was not identical to the coverage and riders then in force for other Crawford employees. (Amazingly, these differences were ignored by the lower courts, but by the same token those courts completely excused plaintiff court's discreditable failure to disclose, on specific inquiry, the existence of actuarial studies of pension costs, on grounds the studies related to slightly different pension plans than the one actually adopted by plaintiff—a grossly unfair double standard used to whipsaw defendants).

Therefore, and in conjunction with Judge Davis' assertion that a change to a PPO-1 plan and change in co-pay for prescription drug coverage would provide long terms net savings sufficient to offset increased retiree healthcare benefits, the Crawford Board of Commissioners properly and legitimately relied on plaintiff's $4,087 figure, and denominating that misrepresentation as fraudulent was by no means objectively unreasonable or subject to summary dismissal[13].

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[13] "A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation." *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Such a claim eliminates the need to prove fraudulent purpose or intent; but correlatively adds the requirements that the misrepresentation was made in connection with the creation of a contract, the injury suffered inured to the benefit of the party making the misrepresentation, and the parties were in privity of contract. *Id.* at 27-28.

Indeed, a contemporaneous[14] published decision of the Court of Appeals, thoughtfully rendered in contrast to that in the present case, points up the error in refusing to find at least a triable issue of fact as to fraud, including reliance. In *Foreman v Foreman*, ___ Mich App ___; ___ NW2d ___ (No. 250412, May 3, 2005), slip op. pp. 6-8 (Attachment D), the Court analyzed the sufficiency of the evidence supporting a claim of fraud (emphasis added):

> * * * Furthermore, "the mere fact that statements relate to the future will not preclude liability for fraud if the statements were intended to be, and were accepted as, representations of fact, and involved matters peculiarly within the knowledge of the speaker." *Crook v Ford*, 249 Mich 500, 504-505; 229 NW 587 (1930). "Intent is a mental condition and is determined not so much by what one says as it is by what one does." *Detroit Trust Co v Hartwick*, 278 Mich 139, 152; 270 NW 249 (1936). Consequently, direct proof of fraud is not required, and fraud may be proven by inference from facts and circumstances. *Id.* Thus, where fraudulent intent is required, it need not be determined

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14 Actually, *Foreman v Foreman* was binding on the panel that decided this case. *Foreman* was issued at 9:00 a.m. on May 3, 5 minutes ahead of the opinion in this case. *Foreman* is thus a "prior published decision" binding by virtue of MCR 7.215(J)(1); it was error to fail to follow *Foreman* in this case.

solely by words, but may be established by actions and inferences arising therefrom.

We disagree with defendant's assertion that his statements regarding the value of the dealership were merely statements of opinion. * * * The evidence presented by plaintiff established that defendant, himself and through his expert, repeatedly represented that the value of the dealership was between $500,000 and $1.1 million, that **plaintiff was ignorant of the value of the dealership and was not able to inspect the property in the same manner as a purchaser, and that defendant made the representations with the intent that plaintiff, plaintiff's attorney and the mediator rely on them.** *Poloms, supra.*

* * * Based on defendant's intimate personal knowledge and representations regarding the intricacies of the nature of his business, *Groening, supra,* **defendant cannot assert that his statements regarding value were mere opinions not subject to recovery in an action for fraud.**

Defendant also contends that any reliance on defendant's representations as to the value of the dealership by plaintiff and her counsel was unreasonable because plaintiff's counsel testified that she knew that the dealership was worth more than defendant was representing. Moreover, defendant asserts that detrimental reliance did not occur

because plaintiff agreed to accept the valuation of the mediator, who valued the property at $1.7 million. We disagree with defendant's contentions. Again, the evaluation of the elements of fraud is to be evaluated in light of all facts and circumstances, and direct proof of intent is not required. *Detroit Trust, supra; McDonald, supra.* Rather, actions and inferences arising from the acts may be considered. *Detroit Trust, supra.*

* * * Moreover, when plaintiff agreed to allow the mediator to resolve the fair market value of the dealership, **plaintiff was unaware of the presentation of fraudulent information to the mediator for resolution.** Upon learning of the *potential* sale of the dealership through her son, plaintiff opposed the settlement agreement. However, **the trial court ordered the plaintiff to enter into the settlement agreement upon receiving testimony from defendant that he did not intend to sell the dealership** * * *

There was also testimony by plaintiff's counsel, Harriet Rotter, that had she known that defendant was going to sell the dealership within such a short time after entry of the divorce judgment, she would have tied the amount plaintiff was to receive in the property settlement to the actual sale price of the dealership; she did not do so because she believed defendant's representations. Similarly, plaintiff testified that she would not have been willing to reach the same agreement

had she known that defendant planned to sell the dealership as soon as the divorce was final. Rotter and plaintiff both testified that the entire settlement agreement was structured around defendant's professed intent to keep the dealership. **This testimony was sufficient, if believed, to allow the jury to conclude that defendant's misrepresentations as to his intention to keep the dealership, defrauded plaintiff out of an appropriate share of the proceeds of the sale.** Testimony indicated that the sale of the dealership resulted in payment to defendant of in excess of $3 million after the payment of dealership debts and liabilities. We conclude therefore that there was sufficient evidence presented to support the jury's conclusion that plaintiff was defrauded of $1 million relating to the value of the dealership, as a result of defendant's misrepresentations as to his intent to sell the dealership and the impact of those statements on the treatment of the value of the dealership in the property settlement and the adoption of value by the mediator.

Further, as to statements relating to his intent to continue operating the dealership until retirement, defendant asserts that such statements, being statements of future intent, are not actionable. We disagree. A fraudulent misrepresentation may be based on a promise made in bad faith, without the intention of performance. *Hi-Way, supra* at 337-338. Thus, a claim of fraud lies "where although no proof

> of the promisor's intent exists, the facts of the case compel the inference that the promise was but a device to perpetuate a fraud." *Id.* at 339. **In any event, future statements support an action for fraud where the representations of fact are intended to be relied upon and accepted, and where the matter was within the particular knowledge of the speaker.** *Crook, supra.* **We conclude that plaintiff presented sufficient testimony which, if believed, allowed the jury to infer from defendant's conduct and the circumstances of the sale of the dealership that, while denying outwardly any intention to do so, defendant intended all along to sell the dealership and that he represented otherwise with an intent to gain financial advantage over plaintiff in the divorce proceedings. * * * Plaintiff and her counsel testified that they relied on defendant's representations** that he had no intention of selling the dealership in agreeing to the eleven-year payment plan provided in the settlement agreement, and that had they known that defendant was going to sell the dealership, they would have insisted that the balance owing to plaintiff be paid from the proceeds. **This testimony was sufficient to support the jury's award in this regard.**

In this case, likewise, plaintiff (Chief Judge Davis and administrator Rudi Edel) had superior knowledge and exclusive access to information (such as actuarials) not equally available to Crawford and Kalkaska (which through FOIA had belatedly obtained actuarials from MERS and Otsego, learning

at this time that nine such actuarial studies had been furnished to either plaintiff court or Otsego County) (Appendix 13). Here, also, Crawford and Kalkaska relied on plaintiff's financial projections, **incorporating them into the retiree healthcare resolution of August 29, 2000.** Five (5) Crawford commissioners have filed affidavits stating they did not know the financial projections and cost estimates foisted on them by plaintiff or its agents were incorrect, and that they relied on those figures in taking the action they did on August 29, 2000. (Appendix 18) As in *Foreman*, this evidence alone is sufficient to create a triable issue of fact and to preclude summary disposition (and, *a fortiori*, to preclude sanctions on either the counties or their counsel). And, as in *Foreman*, it is an unconscionable and egregious injustice that the counties have been ordered to enter into a contract with plaintiff court so it can profit from its misrepresentations.

Issue III. The December 14, 2001 Letter From Crawford Controller Compo to Attorney Cohl is Protected by Attorney-Client Privilege.

Standard of Review

Appellate review of a claim of attorney-client privilege is *de novo*. *Koster v June's Trucking, Inc*, 244 Mich App 162, 166; 625 NW2d 82 (2000). Whether the attorney-client privilege applies and, if so, whether it has been waived, are questions of law reviewed *de novo*. *Leibel v General Motors Corp*, 250 Mich App 229, 236, 240, 244; 646 NW2d 179 (2002); *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618; 576 NW2d 709 (1998).

The attorney-client privilege attaches to direct communication between a client and his or her attorney, as

well as communications made through their respective agents. *Reed Dairy Farm v Consumers Power Co* at 618. Where an attorney's client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization authorized to speak on its behalf in relation to the subject matter of the communication. *Id.* at 619. "The purpose of the attorney-client privilege is to permit a client to confide in the client's counselor, knowing that the communications are safe from disclosure." *Co-Jo, Inc v Strand*, 226 Mich App 108, 112; 572 NW2d 251 (1997). Hence, "facts confidentially disclosed to an attorney by employees of the client are covered by the attorney-client privilege." *Reed Dairy Farm v Consumers Power Co, supra*, 227 Mich App at 122.

Analysis

A. Introduction

Appellants first note that the privileged memorandum in question did not render the Counties' defensive fraud claim devoid of arguable merit, did not warrant the imposition of sanctions against the appellant law firm and is certainly not the "smoking gun" that the plaintiff court and lower court make it out to be. The memorandum is simply a collection of Mr. Compo's thoughts pertaining to a myriad of issues pertaining to the funding dispute in an attempt to assist counsel in settling the dispute. Despite the fact that Mr. Compo was neither a member of the Crawford County Board of Commissioners nor a mind-reader, Plaintiff asserts that his thoughts regarding what the Crawford Commissioners supposedly knew on August 29, 2000 (approximately 16 months prior to him drafting the memorandum) should be taken as gospel. Plaintiff curiously does not want to lend any credence to Mr. Compo's other thoughts in the memorandum, e.g., "Crawford County had not agreed to the contract offered

by the Judge," or "Crawford County has not agreed to fund the retirement health plan." Despite the fact appellant contends the memorandum did not strip the Counties' pleaded fraud defense of arguable merit, it nevertheless is protected by attorney-client privilege, and therefore should not have been relied upon by the lower court.

B. Additional Facts: The December 14th Privileged Communication at Issue.

On December 14, 2001, Crawford Controller Paul C. Compo faxed a letter (Appendix 25, (under seal)) to attorney Peter Cohl, of Cohl, Stoker, Toskey & McGlinchey, P.C., legal counsel to Crawford County, concerning the subject of the then-ongoing mediation (per Administrative Order 1998-5, §III) between Crawford and the 46th Circuit Trial Court. That was an early stage of a dispute that developed into the present litigation. As is apparent from its text, this epistle was generated to assist counsel in responding to material presented as part of plaintiff court's effort to force Crawford to sign the proposed September 6, 2000 contract and to wrest additional operational funding from Crawford. Mr. Compo submitted an affidavit to the lower court, averring that (1) he did not intend that this letter be publicly disclosed; (2) he did not authorize Mr. Cohl or any other legal representative of Crawford to release the letter to third persons; (3) he did not himself reveal the letter to any third persons; and (4) he did not authorize or permit any of his subordinates or clerical or secretarial staff having access to the files kept by him within the Crawford County Building to either access or divulge the contents of the letter.

C. The December 14th Privileged Communication Was

Not Among Documents Ordered Disclosed by the Lower Court, Was Not Advertently Disclosed By Counsel For Crawford With Permission Of The Client During Discovery, And The Attendant Privilege Was Never Waived.

1. **The December 14th Privileged Communication Was Not Among The Documents Ordered Disclosed By The Lower Court.**

The Court of Appeals did agree with this assertion, finding it uncontested. (Appendix 1, p. 16, n. 50). Therefore, further discussion is unnecessary.

2. **The December 14th Privileged Communication Was Not Advertently Disclosed By Counsel For Crawford During Discovery In This Matter With Permission Of The Client.**

The Court of Appeals did agree with this assertion, finding it uncontested. (Appendix 1, p. 16, n. 50). Therefore, further discussion is unnecessary.

D. **The Admissibility And Disclosure Of The December 14th Privileged Communication Was Timely Objected To When Plaintiff's Possession Of The Document Was First Revealed.**

When counsel for plaintiff court first revealed his possession of the December 14th Privileged Communication during the deposition of Paul Compo on March 3, 2003, counsel for Crawford *immediately* objected to its use or

admission based upon attorney-client privilege. Plaintiff's counsel gave an at best ambivalent (if not deliberately misleading) answer as to the provenance of the document, and then conceded that the objection was duly made and preserved. (3/3/03 Compo Dep, Ex 17 of 4/23/03 Answer to MSD Brief, pp 135-136).

E. The Essential Nature Of Attorney-Client Privilege.

The attorney-client privilege protects a client against disclosure of whatever the client communicated to the attorney in the quest for legal advice or assistance. *Parker v Assoc Discount Corp*, 44 Mich App 302, 306; 205 NW2d 300 (1973); *Upjohn Co v United States*, 449 US 383, 394-395; 101 S Ct 677; 66 L Ed 2d 584 (1981). Michigan jurisprudence recognizes that the client's privilege of confidentiality is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the identical or equivalent information from other sources. *General Elec Co v Valeron Corp*, 428 F Supp 68, 74; 196 USPQ 298 (ED Mich, 1977); *Emle Industries, Inc, v Patentex, Inc*, 478 F2d 562, 572-573 (CA 2, 1973).

In *Reed Dairy Farm v Consumers Power Co, supra*, 227 Mich App at 618-619, the Court of Appeals considered the scope of the attorney-client privilege:

> The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents. The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his advisor that are made for

> the purpose of obtaining legal advice. Where an attorney's client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization authorized to speak on its behalf in relation to the subject matter of the communication.

The attorney client privilege is given a "somewhat liberal interpretation" because "[d]oubtless such interpretation is essential to a proper protection of the rights of the client". *Lindsay* v *Lipson*, 367 Mich 1, 5; 116 NW2d 60 (1962).

The issue of whether the attorney-client privilege may be asserted is one of law. *Koster v June's Trucking, Inc*, 244 Mich App 162, 166; 625 NW2d 82 (2000). In *Grubbs v K Mart Corp*, 161 Mich App 584, 589; 411 NW2d 477 (1987), the Court of Appeals opined:

> The attorney-client privilege attaches to communications made by a client to the attorney acting as a legal adviser and made for the purpose of obtaining legal advice on some right or privilege. The purpose of the privilege is to allow a client to confide in his attorney, secure in the knowledge that the communication will not be disturbed. [Citations omitted.]

Importantly, the Court noted that "[c]ommunications made through a client's agent are privileged." *Id.* Here, Mr. Compo, as an agent of Crawford, was seeking legal advice from Mr. Cohl, and the communication falls squarely within the scope

of the privilege. *McCartney v Attorney General*, 231 Mich App 722, 735; 587 NW2d 824 (1998).

Indeed, the Court in *McCartney*, 231 Mich App at 732 n 4, upheld the privilege as to just such a letter (emphasis added):

> FN4. Plaintiff argues that the draft letter written by the Governor's office was not protected by the attorney-client privilege. He claims that documents forwarded to an attorney, which the author intends to make public, are never privileged because there is no expectation of privacy. In this case, there was an uncontradicted affidavit that the letter was a draft at the time it was sent to defendant for legal assistance. **There is no evidence or testimony that the Governor intended to make the draft letter public.** Moreover, although a final letter was sent to the tribal negotiators, it was never made public or intended to be made public according to the record presented before this Court. Thus, plaintiff's argument fails.

Here, likewise, Mr. Compo's affidavit indicates he neither intended that his letter be made public nor authorized anyone to disclose its contents outside the coteries of attorneys representing Crawford in this litigation. Again, this was found to be conceded (Appendix 1, p. 16, n. 50).

F. The Privilege Protecting The December 14th Communication Was Never Validly Waived.

At the outset of any discussion of waiver, it must be reiterated that Plaintiff's counsel conceded on March 3, 2003 that objection to his use of the document was duly preserved. MCR 3.206(D)(4) also establishes that the objection is preserved; defendants did not thereafter attempt to introduce the letter or testimony of Mr. Compo relating to the subject matter of the letter at any subsequent evidentiary proceeding. But more importantly, once plaintiff court's counsel conceded that objection was preserved, the burden was on him to establish the provenance of the letter and his ability to use it, not on appellants to object a second time—once timely and sufficient objection is raised, the adverse party is on notice and proceeds at its peril. *People v Logie*, 321 Mich 303, 307; 32 NW2d 458, 460 (1948). ("it was hardly necessary for one counsel to repeat the objections made by the other . . ."). The attorney-client privilege belongs to the client and only the client may waive it. *Ravary* v *Reed*, 163 Mich App 447, 453; 415 NW2d 240 (1987), quoting *Passmore* v *Passmore's Estate*, 50 Mich 626, 627; 16 NW 170 (1883); *In re Arnson's Estate*, 2 Mich App 478, 484; 140 NW2d 546 (1966); *Agee v Williams*, 17 Mich App 417, 423; 169 NW2d 676 (1969). Waiver of attorney-client privilege does not occur by sharing of information among parties facing a common adversary. *United States v American Tel & Tel Co*, 206 US App DC 317, 331-332; 642 F2d 1285, 1299-1300 (DC Cir, 1980); *Continental Oil Co v United States*, 330 F2d 347, 349-350 (CA 9, 1964). Nor does waiver result from disclosure compelled by court order. *Co-Jo, Inc v Strand, supra* at 113-114.

The attorney-client privilege cannot be waived by implication; only a "voluntary relinquishment of a known right" can waive the privilege. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 616; 600 NW2d 66 (1999).

Here, there is no evidence that the attorney client privilege was waived by Crawford County. The burden was on Plaintiff, after timely and proper objection, to justify its use of privileged information which it did not legitimately possess. Any use made of such privileged information by plaintiff court is wrongful, *Massa v Eaton Corp, supra;* a document inadvertently produced but otherwise privileged remains protected. *Leibel v General Motors Corp,* 250 Mich App 229, 241; 646 NW2d 179 (2002).

Issue IV. The Lower Court Erred in the Manner in Which It Liquidated the Amount of Sanctions, in That Plaintiff's Attorneys Themselves Could Not Ascertain The Hours Devoted to the Fraud Defense, Except by a Guesstimate, and Thus Plaintiff Never Carried Its Burden of Proof.

Standard of Review

Appellate review of the reasonableness of an award of attorney fees, when entered after evidentiary hearing, is *normally* for abuse of discretion. *Jordan v Transnational Motors, Inc,* 212 Mich App 94, 97; 537 NW2d 471 (1995). An abuse of discretion exists if an unprejudiced person, considering the facts upon which the trial court acted, would say there is no justification or excuse for the ruling, or if the result is so violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias. *Schoensee v Bennett,* 228 Mich App 305, 314-315; 577 NW2d 915 (1998); *Cleary v Turning Point,* 203 Mich App 208, 210-211; 512 NW2d 9 (1993).

However, where, as here, a trial court's award of sanctions is directly premised on its erroneous view of the law

underlying the issue on which attorney fees are being awarded, review is *de novo*. *Mantei v American Fellowship Mut Ins Co*, 1999 Westlaw 33446478 (Mich App No 205153, April 27, 1999), slip op p. 8, n. 1 (copy attached, **Attachment E**, per MCR 7.215(C)(1)).

Analysis

A. Additional Facts

In moving to liquidate the sanctions awarded, the 46th Circuit Trial Court presented a copy of its attorney fee invoices and an affidavit of one of its attorneys, Noel Massie, acknowledging that the 46th Circuit Trial Court could not accurately identify any particular number of hours devoted to fraud-related issues, but "guesstimating" that 25% of all the time devoted to the case had been so expended up to the point where the fraud counterclaims were summarily dismissed.

The counties and their counsel proffered proof, based on careful parsing of a welter of deposition transcripts, that, contrary to the "guesstimate" proffered by Mr. Massie, at most 5% of the attorney fees could be linked to fraud-related issues. (Appendix 19,Affidavit of Edward J. Starmer, attorney with appellant law firm) They also challenged the number of hours billed as unreasonable and the hourly fees claimed as also unreasonable.

Judge Kolenda, without holding any evidentiary hearing, relied on his own knowledge (including his claimed personal experience as a former municipal attorney of inflating his hours billed to his clients, as recompense for being paid a below-standard rate) and awarded sanctions equal to 20% of the total fees incurred by the 46th Circuit Trial Court (80% of what was requested). Subsequently, however, on remand

with respect to attorney fees, Judge Kolenda used exactly the Starmer methodology in applying the "150% rule"—the difference was that, on remand, application of Starmer's method was to the benefit of plaintiff court, another grossly unfair double standard.

B. Plaintiff's Attorney's Guesstimate as to the Amount of Hours Devoted to Defending the Retiree Health Care Fraud Counterclaim is Not Sufficient to Carry Its Burden of Proof.

Plaintiff's attorneys themselves forthrightly acknowledged that they could not reliably ascertain how many hours any of the attorneys for the 46th Circuit Trial Court devoted to the counterclaim, Plaintiff's 9/3/03 Brief, p. 9, citing Massie Affidavit, ¶7, which is the sole proper subject of the sanctions sought to be liquidated. The best Plaintiff could do was produce a guesstimate of 25%. Indeed, Plaintiff made no effort to identify a single attorney hour specifically and only devoted to the counterclaim and so invoiced in the time records; even the invoice of February 13, 2003, covering the January 30, 2003 summary disposition hearing on the counterclaim, commingles the time involved with that spent on a status conference, preparing for a deposition, and reviewing documents (again, with two attorneys doing the work of one but billing for three).

Aside from the fact that such a guesstimate is wildly high by an order of magnitude—very little discovery was addressed to the subject, and the counterclaim was dispensed with by motion—recovery may not be had on this basis. The claimant of attorney fees bears the burden of proving a right of recovery by a preponderance of the evidence. *Matter of Estate of Krueger, supra,* 176 Mich App at 249. Proof by a

preponderance of the evidence requires more than mere possibilities, speculation, conjecture, or "best guess"; there must be competent evidence that makes it more likely than not that 25% is an accurate proportion. As explained in *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997):

> "The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." [*Id.* at 164-165, 516 NW2d 475, quoting Prosser & Keeton, Torts (5th ed.), § 41, p 269]. [[FN12]]
>
> FN12. See also *Jordan v Whiting Corp.*, 396 Mich 145, 151, 240 NW2d 468 (1976) ("[t]he mere possibility that a defendant's negligence may have been the cause, either theoretical or conjectural, of an accident is not sufficient to establish a causal link between the two"); *Glinski v Szylling*, 358 Mich 182, 201-202, 99 NW2d 637 (1959) ("[a] case cannot go to a jury supported merely by sheer speculation that something might have been a cause, or, going one step further, that there was a possibility that something was the cause"); *Daigneau v Young*, 349 Mich 632, 636, 85 NW2d 88 (1957) (" '[t]here must be more than a mere possibility

> that unreasonable conduct of the defendant caused the injury' ").

Where, as here, the proponent having the burden of proof confesses at the outset that it can do no more than produce a "reasonable estimate", its inability to satisfy the preponderance of the evidence test is so manifest that no hearing should be necessary to reject its claim.

Counsel for plaintiff court tried to excuse his lack of competent proof by suggesting that, until the motion for sanctions was granted, its counsel had no reason to differentiate how their time was being spent. No one compelled plaintiff's counsel to request sanctions; having opted to do so, it was incumbent on plaintiff's counsel to produce competent evidence to support the fee award sought.

The case law is legion that time records must reflect an hourly breakdown, showing what was done and at what fee, as a prerequisite to any effort to claim that charges were reasonably incurred in conjunction with the proceedings. *Antiphon, Inc v LEP Transport, Inc, supra,* 183 Mich App at 386; *Temple v Kelel Distrib Co, Inc, supra,* 183 Mich App at 330-333; *Brown v Gillette Co, supra,* 536 F Supp at 119-120; *Furtado v Bishop, supra,* 635 F2d at 920.

C. The Lower Court Erred in Failing to Hold an Evidentiary Hearing.

Before a court can award $1 of attorney fees, where issues of fact are raised, it must first hold an evidentiary proceeding to resolve questions of fact as to the proper hourly rate or the appropriate number of hours, or any similar question. *Barbier v Piku,* 460 Mich 854; 599 NW2d 100 (1999).

As the Court held in *Herald Co v Tax Tribunal*, 258 Mich App 78, 92-93; 669 NW2d 862 (2003):

> The trial court did not hold a hearing to determine reasonable attorney fees and costs, but merely accepted plaintiff's rendition of total fees and costs for the entire litigation. We conclude that this was error. **It was incumbent upon the trial court, in its fact-finding role, to conduct a hearing to determine the appropriate amount of attorney fees and costs owed** * * *

Similarly, the Court of Appeals ruled in *Miller v Meijer, Inc*, 219 Mich App 476,479; 556 NW2d 890 (1996):

> Where, as in this case, the party opposing the taxation of costs challenges the reasonableness of the fee requested, the trial court should inquire into the services actually rendered before approving the bill of costs. *Wilson v General Motors Corp*, 183 Mich App 21, 42; 454 NW2d 405 (1990). "**Although a full-blown trial is not necessary, an evidentiary hearing regarding the reasonableness of the fee request is.**" *Id.* at 42-43, 454 NW2d 405; *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983).

The refusal to hold an evidentiary hearing and put claimant(s) to its proofs was patently reversible error. Judge Kolenda knew nothing about what occurred outside his courtroom and could not rely on his own past practice in inflating his hours worked to find facts without formal proofs

and without appellants having an opportunity for cross-examination and testing the credibility of Mr. Massie's affidavit.

RELIEF REQUESTED

Appellant law firm respectfully requests that the Court reverse summary disposition of the fraud claims, which *ipso jure* will require reversal of sanctions based on pleading a "frivolous" cause of action.

Alternatively, the Court should reverse the decision to impose sanctions because counsel had a good faith basis for pleading the fraud claim as to retiree health care on behalf of its clients, even if the claim was properly summarily dismissed.

In any event, it is important to note that on earlier interlocutory appeal, the Court of Appeals ruled that counsel for plaintiff is limited in the fees it may charge. *46th Circuit Trial Court v Crawford County*, 261 Mich App 477; 682 NW2d 519 (2004), *lv held in abeyance* 687 NW2d 297 (2004)[15]. This

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15 Notwithstanding the pending appeals from the Court of Appeals' April 1, 2004 ruling being held in abeyance here, the Court of Appeals' ruling collaterally estops plaintiff and its counsel, *Monat v State Farm Ins Co*, 469 Mich 679; 677 NW2d 842 (2004), slip op p 15; *City of Troy Bldg Inspector v Hershberger*, 27 Mich App 123, 127-128; 183 NW2d 430 (1970); *NAACP v Detroit Police Officers Ass'n*, 525 F Supp 1215, 1223 (ED Mich, 1981), MCR 7.215(C)(2), from seeking or collecting higher fees as sanctions than they may permissibly bill their client, as that would subject appellant law firm to

requires at least that plaintiff's attorney fees be reduced in comparison with what was allowed by the lower court in calculating sanctions. Even if there were no other errors, a remand for evidentiary hearing to conform the sanctions award to those limitations would be required.

Respectfully submitted,

_____/s/_____

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unlawful punitive damages. *Rafferty v Markovitz*, 461 Mich 265, 270-271; 602 NW2d 367 (1999); *McAuley v General Motors Corp*, 457 Mich 513, 519-520; 578 NW2d 282 (1998).

STATE OF MICHIGAN
IN THE SUPREME COURT

CRAWFORD COUNTY, CRAWFORD COUNTY BOARD OF COMMISSIONERS,
And KALKASKA COUNTY,
Plaintiffs

and

COHL, STOKER, TOSKEY & McGLINCHEY, P.C.,
Appellant

Supreme Court No. _____
-v- Court of Appeals No. 254182
46th Circuit Court (Otsego) No. 02-10014-CZ

OTSEGO COUNTY,
Defendant-Appellee

APPELLANT COHL, STOKER, TOSKEY & McGLINCHEY, P.C.'S APPLICATION FOR LEAVE TO APPEAL

Submitted By:

Allan Falk (P13278)
Allan Falk, P.C.
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STATEMENT OF BASIS OF JURISDICTION

The jurisdiction of the Court of Appeals is defined by law. Const 1963, art 6, § 10. The Court of Appeals has jurisdiction over appeals as of right from final judgments of the circuit courts. MCL 600.308(1)(a).

In this case, the final judgment as defined in MCR 7.202(7)(a)(i) was entered in these consolidated cases (both filed in the circuit court for the 46th circuit– Case No. 02-5291-CZ, which was filed in Crawford County, and Case No. 02-10014-CZ, which was filed in Otsego County, both being part of the 46th judicial circuit per MCL 600.1162d) on February 26, 2004. A timely claim of appeal was then filed on March 3, 2004. MCR 7.204(A)(1)(a). The Court of Appeals therefore had proper and plenary jurisdiction of this appeal. MCR 7.203(A)(1). This appeal of right subsumed an appeal of all underlying interlocutory orders, any or all of which could be challenged by the appellant in an appeal of right from the final order. *Tomkiw v Sauceda*, 374 Mich 381; 132 NW2d 125 (1965).

This timely application for leave to appeal from the Court of Appeals' May 3, 2005 opinion adjudicating that appeal of right is therefore within the Supreme Court's jurisdiction pursuant to MCR 7.301(A)(2) and Const 1963, art 6, §4.

STATEMENT OF QUESTIONS PRESENTED

I. DID THE LOWER COURT ERR IN SUMMARILY DISMISSING CRAWFORD AND KALKASKA'S COMPLAINT FOR DECLARATORY RELIEF BASED ON THE UNIFORM BUDGETING AND ACCOUNTING ACT (UBAA), MCL 141.421 *ET SEQ.*, FOR LACK OF STANDING?

A. Is Declaratory Relief Is Properly Sought, Even When A Party Lacks Standing To Seek Or Obtain Other Forms of Relief?

B. Were All Other Prerequisites to Declaratory Relief Satisfied Here, and Did Crawford and Kalkaska Have Proper Standing To Seek Relief Under MCL 600.8271?

C. Does A Party Has Proper Standing to Seek Declaratory Relief If a Favorable Decree May Lead To Beneficial Action Either By the Defendant Or a Third Party?

D. Did The Lower Court Further Erred In Raising the Issue of Standing *Sua Sponte*?

Defendants/Appellants say, "Yes" to the principal question and all subquestions.

Plaintiff/Appellee says, "No."

The lower Court said, "No."

II. EVEN IF THE REQUEST FOR DECLARATORY RELIEF WAS PROPERLY SUMMARILY DISMISSED, WHETHER THE PLEADING WAS NOT FRIVOLOUS, AND WHETHER THE LOWER COURT ERRED IN SANCTIONING COUNSEL FOR HAVING RAISED THE MATTER?

A. Was A Sufficient Good Faith Argument In Support Of Declaratory Relief Made To Preclude The Imposition Of Sanctions For "Frivolous Pleading"?

Defendants/Appellants say, "Yes" to the principal question and all subquestions.

Plaintiff/Appellee says, "No."

The lower Court said, "No."

III. DID THE LOWER COURT ERR IN SANCTIONING THE PARTIES AND THEIR COUNSEL FOR HAVING ASSERTED A CLAIM OF FRAUD WITHOUT ANY FACTUAL SUPPORT, WHERE THE CLAIM WAS PREDICATED ON A CRUCIAL ADMISSION BY OTSEGO COUNTY?

A. Was It Was Clear Error To Impose Sanctions Where, Contrary To the Lower Court's Ruling, the Claims Of Fraud Against Otsego Were Not Without Factual Foundation When Filed?

Defendants/Appellants say, "Yes" to the principal question and all subquestions.

Plaintiff/Appellee says, "No."

The lower Court said, "No."

IV. DID THE LOWER COURT ERR IN THE MANNER IN WHICH IT LIQUIDATED THE AMOUNT OF SANCTIONS, DENYING THE COUNTIES AND THEIR COUNSEL A PROPER EVIDENTIARY HEARING?

A. Whether The Lower Court Erred In Failing To Hold An Evidentiary Hearing To Liquidate Attorney Fees Awarded As Sanctions.

B. Were The Attorney Fees Awarded as Sanctions Are the Product of an Unreasonable Number of Hours Charged for Unreasonably Duplicated Legal Services.

C. Did The Lower Court Err In Holding Crawford, Kalkaska, And Their Attorneys Liable For More Than An Aliquot Portion Of The Attorney Fees Attributable To Sanctionable Misconduct?

Defendants/Appellants say, "Yes" to the principal question and all subquestions.

Plaintiff/Appellee says, "No."

The lower Court said, "No."

STATEMENT OF FACTS

This is an appeal by the law firm of Cohl, Stoker, Toskey & McGlinchey, P.C., from the imposition of sanctions based on asserted "frivolous pleading" in the firm's representation of Crawford and Kalkaska Counties against Otsego County ancillary to the underlying court funding litigation. Appellant law firm was sanctioned for referencing the Uniform Budgeting and Accounting Act ("UBAA"), MCL 141.421 *et seq*, in its complaint against Otsego, on the theory its clients had no standing to raise such issues. Appellant was also sanctioned for pleading a claim of fraud against Otsego County without any factual basis. The Court of Appeals affirmed in a published opinion (Appendix 1). To the extent the sanctions also apply to Crawford and Kalkaska Counties, the same issues are raised in the separate appeal from Court of Appeals No. 254180.

A. PROCEDURAL HISTORY

1. References to The Uniform Budgeting and Accounting Act.

In the course of defending the lawsuit filed by the 46th Circuit Trial Court on the basis of breach of contract, Crawford and Kalkaska Counties ("Crawford and Kalkaska") filed their Complaint against Otsego County (hereinafter Otsego) (Case No. 02-10014-CZ) on November 26, 2002, seeking, *inter alia*, declaratory relief. Otsego, as the Control Unit for the 46th Trial

Court, had unilaterally implemented disputed fringe benefit enhancements for employees of the 46th Circuit Trial Court, without the consent or approval of Crawford and Kalkaska Counties, and in excess of the appropriations approved by Crawford and Kalkaska.

Counts I and II alleged that Otsego exceeded its authority and acted contrary to law, and sought declaratory and injunctive relief.[1] Count II made reference to various provisions of the UBAA, as *possible exemplars* of the laws which Otsego's actions may have put Crawford and Kalkaska in danger of violating; no relief based on the UBAA was sought (other than a declaration that Otsego's action may have the effect of causing Crawford and Kalkaska to violate the UBAA by not having balanced budgets). A First Amended Complaint was filed on December 9, 2002.

On December 9, 2002, Crawford and Kalkaska Counties brought a Third Party Complaint against Otsego County in the original action, Case No. 02-5951-CZ. The Third Party Complaint also sought declaratory and injunctive relief on the grounds that Otsego exceeded its authority and acted contrary to law. There was reference in Count II to the UBAA, among

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[1]A claim of silent fraud in Count III was later withdrawn by the Counties, after Otsego demonstrated during discovery that, despite adopting a false resolution reciting the contrary in order to implement the disputed pension benefits, it had never received or possessed actuarial studies showing the cost of the MERS B-4 pension plan, which studies the Court Administrator admitted during discovery were performed at his request and kept in his sole possession in a locked desk drawer. (Appendix 2 pp 85-87, 122)

other laws. The two *Crawford/Kalkaska v Otsego* cases were consolidated by the lower court. **At no time did Crawford or Kalkaska seek the recovery of any funds or damages via "enforcement" of the UBAA; the entire thrust of the references to the UBAA was focused on whether Otsego's actions as the control unit for the 46th Trial Court would effectively cause Crawford and Kalkaska to exceed their own respective budget appropriations and thereby violate the UBAA, not whether Otsego violated the UBAA.**

Specifically, the precise extent to which the UBAA was referenced is as follows:

COUNT I
DECLARATORY JUDGMENT

* * *

60. Otsego knew or should have known that Crawford was required to assent to the additional funding for the fringe benefit enhancements sought by the Court. Specifically, in or about April 3, 2002, Otsego was provided a copy of a report from the State Treasury-Audit Division which concluded:

"There is no provision in the Uniform Budgeting and Accounting Act that authorizes the legislative body of one local unit to amend the appropriations act (budget) of another local unit."

* * *

COUNT II
DECLARATION THAT OTSEGO EXCEEDED ITS AUTHORITY

* * *

82. The Uniform Budgeting and Accounting Act, MCL 141.421, et seq, provides that a deviation from an original general appropriations act (such as Crawford's appropriation for the costs of the Uniform Court) shall not be made without amending the general appropriations act.

83. The Uniform Budgeting and Accounting Act, MCL 141.438 (3) provides that a local unit shall not incur expenditures against an appropriation account in excess of the amount appropriated by the legislative body. The chief administrative officer, an administrative officer, or an employee of the local unit shall not apply or divert money of the local unit for purposes inconsistent with those specified in the appropriations of the legislative body.

84. The Uniform Budgeting and Accounting Act, MCL 141.439 (3) provides that a member of the legislative body, the chief administrative officer, an administrative officer, or an employee of a local unit shall not authorize or participate in the expenditure of funds except as authorized by a general appropriations act. An expenditure shall not

> be incurred except in pursuance of the authority and appropriations of the legislative body of the local unit.

* * *

On January 13, 2003, Otsego filed its first responsive pleading, answering the First Amended Complaint in Case No. 02-10014-CZ, as well as the Third Party Complaint in Case No. 02-5951-CZ, and asserting its affirmative defenses. **Relevant to the point of controlling the issue of whether the complaints were so frivolous they warranted sanctions, Otsego itself did not raise the defense of lack of standing to enforce the UBAA in either of its first responsive pleadings, or at any subsequent time.**

More than two months after filing its first responsive pleadings, on March 25, 2003, Otsego moved for summary disposition of both complaints, arguing only that the complaints should be dismissed because, as the control unit, Otsego had simply followed the 46th Circuit Trial Court's Administrative Order 2000-11(Appendix 9) to implement the fringe benefits pursuant to a purported September 6, 2000 "contract" (a "contract" never executed by Crawford, and as to which Kalkaska's assent was rescinded when certain underlying misrepresentations came to light–see discussion in the accompanying brief on appeal for Crawford and Kalkaska in *46th Circuit Trial Court v Crawford County*, application from Court of Appeals No. 254179). It was only following oral argument on May 1, 2003, when the lower court *sua sponte* questioned for the first time whether Crawford and Kalkaska had standing to *"prosecute a claim"* under the UBAA, that Otsego moved under MCR 2.114 for recovery of attorney fees as sanctions for Crawford and Kalkaska's "frivolous" requests

for declaratory rulings on Counts I and II.

On May 30, 2003, the lower court entered an Opinion and Order granting both Otsego's motion for summary disposition of Counts I and II, and its post hearing motion for sanctions for the same counts. The Order stated in relevant part:

> IT IS FURTHER ORDERED AND ADJUDGED that the Otsego County's motion for summary disposition be, and the same hereby is, GRANTED in large part. **All claims predicated on alleged violations** of the Uniform Budgeting and Accounting act are DISMISSED with prejudice.
>
> ***
>
> IT IS FURTHER ORDERED AND ADJUDGED that Otsego County's motion for sanctions be, and the same hereby is, likewise GRANTED in part. Specifically, the law firm of Cohl, Stoker, Toskey and McGlinchey, PC, is to reimburse said County all attorney fees and costs incurred by it in defense of **all claims** by Crawford County and Kalkaska County **that Otsego County violated the Uniform Budgeting and Accounting Act.**
> (*Emphasis added*)

Notwithstanding Crawford's and Kalkaska's protestations that they had sought neither remedies under nor enforcement of the UBAA, the lower court ruled in its May 30, 2003 Opinion that Crawford and Kalkaska's mere reference to

the UBAA in their pleadings against Otsego was frivolous, because the UBAA provides that violations of Sections 17 to 19 **"may only be enforced"** by the Attorney General or prosecuting attorney, MCL 141.440. Thus, the lower court reasoned, Crawford and Kalkaska lacked standing to pursue their requests for declaratory relief on any basis relating to the UBAA (May 30, 2004 Opinion, pp 19-21) and, despite the fact that standing was never raised by Otsego's counsel in its (1) first responsive pleadings, (2) its affirmative defenses, (3) its motion for summary disposition, or (4) its oral argument, such pleadings were found to not only warrant summary disposition in favor of Otsego, but additionally mandate the imposition of sanctions against Crawford and Kalkaska Counties' counsel for "frivolous" pleading.

2. Sanctions for Pleading Fraud

One of the major disputed issues in the original court funding litigation (Case No. 02-5951-CZ) concerned the 46th Circuit Trial Court's demand for additional appropriations to permit it to implement a MERS B-4 pension plan to all past service credit. The MERS B-4 pension plan, in comparison with the MERS B-2 pension plan that then applied to all judicial employees in Crawford and Kalkaska Counties (with the exception of two Kalkaska probate employees who had a MERS B-3 plan), provides benefits 25% greater, and correlatively more expensive.

In the course of seeking the enhanced pension, the 46th Circuit Trial Court had represented to both Crawford and Kalkaska's Boards of Commissioners that the B-4 plan could be implemented for a cost of only 8.61% of payroll, specifically pointing to Otsego's own cost experience with its department heads and elected officials group. Crawford and Kalkaska repeatedly asked for actuarial studies confirming this cost

representation, being told repeatedly, and falsely, that no such actuarial studies had been obtained (the 46th Circuit Trial Court had in fact obtained 9 actuarial studies from MERS)(Appendix 13), and that the cost of such a study would be prohibitive (Appendix 5, p15 and 63), when it eventuated that MERS actually provided such initial studies for prospective plan participants at no charge (a policy of which plaintiff had taken full advantage, obtaining 9 actuarial studies from MERS at no cost to itself).

In February, 2002, following 18 months of efforts to resolve the dispute regarding the B-4 and the retiree health plans, Crawford and Kalkaska submitted Freedom of Information Act requests to both Otsego and MERS (the FOIA does not apply to the judicial branch). Crawford and Kalkaska learned from the FOIA response from MERS that either Otsego as the control unit or the 46th Circuit Trial Court (MERS' disclosure was ambiguous in this respect) had obtained 9 different actuarial studies on variations of the proposed pension changes, each of which showed that the cost would range from 17%-20% of payroll, or more than double what had been represented by the 46th Circuit Trial Court *i.e.* 8.61% of payroll.

Otsego's FOIA disclosure denied possession of or access to any actuarial studies, other than three dated December 1, 2001 (Ex 16 to 10/17/03 Answer to Otsego's Motion to Determine Amount of Sanctions). However, MERS additionally revealed in its FOIA response that on August 14, 2001, unbeknownst to either Crawford or Kalkaska, Otsego's Board of Commissioners had adopted a formal resolution approving implementation of the B-4 pension plan for the 46th Trial Court. Otsego's August 14, 2001 resolution recites (emphasis in the original):

> **IT IS RESOLVED** that pursuant to the Initial Actuarial Valuation dated January 1, 2001 by MERS' actuary, MERS benefits stated in Section 1 below are to be provided to the following employee division . . .

It should be noted by the Court that on its MERS boilerplate resolution form MERS cautions:

> **Please note: If no Initial Valuation has been done by MERS' actuary on the specific benefit program . . . then, per Retirement Board requirements, this resolution will not be implemented until a current actuarial valuation is done by MERS' actuary and necessary supporting contribution rates certified.** (Appendix 14)

No copy of the above referenced January 1, 2001 actuarial study, the existence of which was established by MERS' FOIA response and Otsego's possession of which was certified by its own implementing resolution, was provided in Otsego's FOIA disclosure. Finally, because prior to Otsego's FOIA disclosure, the 46th Trial Court had denied securing any actuarial valuations (Appendix 12), Crawford and Kalkaska thus initially charged, in Count III of their Complaint against Otsego, that Otsego had perpetrated a fraud of silent omission by failing to disclose the existence, and more important, the substance, of the January 1, 2001 actuarial study (which reflected a cost of 24.4% to 26.2% of payroll, grossly contradicting all cost representations repeatedly made previously by Judge Davis and his Court Administrator to all three counties) prior to implementing the B-4 plan (which

would eventually prove to result in an initial actual cost of 16.34% of payroll).

In fact, Otsego fully knew that Judge Davis relied on Otsego's own cost experience with the B-4 (elected officials and department heads) in repeatedly arguing that the B-4 cost for the Judges and Court employees would only be 8.61% of payroll, like Otsego's. **It would later be revealed that it was Otsego's August 14, 2001 resolution that was false, in that Otsego falsely certified to MERS that it relied on its knowledge of the cost data set out in the referenced January 1, 2001 actuarial study, when in fact it had not, but this was ascertained only during discovery** (Appendix 14). The Court of Appeals became confused between the fraud claim as to Otsego with the fraud claim as to the 46th Circuit Trial Court. The fraud claim as to Otsego was that when Otsego implemented the B-4 plan on August 14, 2001, it had failed to disclose the existence and materiality of the January 1, 2001 actuarial study. The fraud claim as to the 46th Circuit Trial Court concerned false representations made by the Chief Judge on August 29, 2000 regarding the cost of the retiree health plan.

This confusion prompted the Court of Appeals to conclude that Otsego's false representation on or about August 14, 2001, and its February, 2002 FOIA disclosure, could have no impact on Crawford's earlier August 29, 2000 resolution "approving" the B-4 plan (Appendix 1, p. 15). However, subsequent to August 29, 2000, Crawford (and Kalkaska) were involved in ongoing negotiations over the 46th Circuit Trial Court's proposed written contract, assiduously attempting to discover the real costs of the B-4 plan.

Although not relevant to the knowledge counsel for Crawford and Kalkaska had *at the time of filing the complaint and third-party complaint against Otsego in November, 2002,* the following is what happened to cause the fraud complaint against Otsego to be voluntarily dismissed by Crawford and Kalkaska in their April 23, 2003 Brief in Response to Otsego's Motion for Summary Disposition.

During discovery, Rudi Edel, the 46th Circuit Court Administrator, was deposed on March 12, 2003. He testified that he was the person who initiated the Court's conversion from a SEP plan (which only Otsego had) to a MERS plan, and that he alone had sought and received the nine (9) MERS actuarial studies, and further, that he had secreted them locked in his desk drawer and had not shared them with anyone, including Otsego (Appendix 21, pp121-125). Otsego's Administrator, Lambert Chard, testified on March 10, 2003, that despite the clear language in Otsego's August 14, 2001 resolution approving and implementing $1.289 million worth of **retroactive accrued liabilities**, Otsego had never sought, received or seen the referenced January 1, 2001 actuarial study. (Appendix 13) Even though Otsego's explanation appeared incomprehensible, it was on this basis that Crawford and Kalkaska voluntarily dismissed their fraud claim against Otsego (believing that Otsego had also been duped, and choosing to overlook Otsego's adoption of the August 14, 2001 resolution containing a fraudulent certification as to having reviewed the January, 2001 MERS actuarial study).

Nonetheless, as prompted by the lower court during oral argument on Otsego's Motion for Summary Disposition, Otsego moved for sanctions on the theory that the fraud claim was "frivolous." In response, Bonnie G. Toskey of Cohl, Stoker, Toskey & McGlinchey, P.C., lead trial counsel for

Crawford and Otsego, submitted her affidavit, delineating in detail what was known to her and the appellant law firm when the fraud claim was filed against Otsego:

> 4. **I was aware, at the time of the filing of the action** against Otsego County, that * * * **Otsego's August 14, 2001 Resolution – contrary to Otsego County's February 25, 2002 FOIA response which is relied upon by Counsel for Otsego – clearly reflects that Otsego County had specific knowledge of or had in its possession a January 1, 2001 MERS actuarial which was NOT provided to Crawford in the FOIA Response, which WAS NOT shared with Crawford or Kalkaska prior to Otsego County's implementation of the MERS B-4 Plan, and which reflects contribution rates (24.4% to 26.2%) FAR EXCEEDING THE 8.61% RATE represented by the Unified Court. (Brief Ex 11)**
>
> * * *
>
> 6. I was aware, at the time of the filing of the action against Otsego County, that the Unified Trial Court participated in MERS under the auspices of the Otsego County Board of Commissioners. (4/22/02 Letter from Moquin, Brief Ex 18). * * * Further, I knew at the time of the filing of the action against Otsego County, **that as the "sponsoring entity", Otsego County was the entity under the MERS Plan Document which had authority to "request the system's actuary to make an actuarial determination of the contribution requirements that would be**

associated with the Unified Court's participation in the retirement system." (MERS Plan Document, para. 42, Attachment A) I further knew, at the time of the filing of the action against Otsego County, that **MERS requires that actuarials be performed prior to implementation of any pension benefit enhancement and provided to the participating municipality, here Otsego County, prior to any implementation of the MERS B-4 by Otsego County for court employees and judges.** (See Dep of Fred Todd, p 126, attached hereto as Attachment B)

7. I was aware, at the time of the filing of the action against Otsego County, that on February 6, 2002, Crawford submitted a FOIA request to MERS regarding, inter alia, the existence of documents provided to Otsego and/or the Unified Court regarding employees and judges of the 46th Circuit Trial Court (Brief Ex 15). Specifically, to the shock of Crawford, **MERS disclosed the existence of at least nine (9) MERS actuarials [Brief Exs 7 (May 22, 2000) and 11 (January 1, 2001)] prior to Otsego's (thus far unknown) August 14, 2001 implementation of the B-4 Plan which actuarials reflected significantly higher contribution rates than were represented by the Unified Court.**

8. As there is no question that I was aware, at the time of the filing of the action against Otsego County, that based upon the

MERS response to the FOIA request, that the participating municipality, Otsego County, and/or the Unified Court had sought and received at least nine (9) MERS actuarials prior to the August 14, 2001 resolution implementing the B-4 Plan, none of which had been provided to Crawford or Kalkaska. **Further, because Otsego County was the "sponsoring entity" and the "participating municipality", I believed, based upon the MERS Plan Document and my experience with resolutions implementing MERS benefit changes, that Otsego County was, in fact, as least one of the entities (if not the only entity) which received the MERS actuarials.**

9. I was aware, at the time of the filing of the action against Otsego County, that both Crawford and Kalkaska repeatedly inquired of the Unified Court regarding the existence of, and requested the Unified Court provide them with cost information from, MERS actuarials and, further, Crawford on February 1, 2002 sent a FOIA request to Otsego County regarding the existence of the MERS actuarials.

* * *

12. **While I was aware, at the time of the filing of the action against Otsego County, that Otsego County had not disclosed the existence of either the undisclosed May 22, 2000 or the January 1, 2001 MERS actuarials [Brief Exs 7 and 11] in response to the**

February 1, 2002 FOIA request, there were significant good faith reasons why the veracity of this assertion should be challenged. Specifically:

a. Based upon my experience in negotiating union contract benefits under MERS and as counsel for a number of Counties, I knew, at the time of the filing of the action against Otsego County, that as the "sponsoring entity", Otsego County was the entity under the MERS Plan Document which had authority to "request the system's actuary to make an actuarial determination of the contribution requirements that would be associated with the Unified Court's participation in the retirement system" (MERS Plan Document, para. 42, Attachment A). I further knew , at the time of the filing of the action against Otsego County, that MERS requires that actuarials be performed prior to implementation of any pension benefit enhancement and provided to the participating municipality, Otsego County prior to any implementation of the MERS B-4 by Otsego County for court employees and judges. (See Dep of Fred Todd, p 126; Attachment B)

b. **The Unified Court, both through the Chief Judge and through Mr. Edel, consistently claimed that no actuarial costs existed. As such, given that counsel for Crawford knew that, in response to Crawford's FOIA request (Brief Ex 15), that**

MERS had provided the actuarials to either or both Otsego and the Unified Court, then – if the representations of the Unified Court were true, these actuarials HAD to have been sought by and provided to Otsego.

c. Further, prior to the February 1, 2002 FOIA, Mr. Edel, stated that no MERS actuarials had either been requested or received by the Unified Court. (Brief Ex 12) As such, it was apparent that the elusive actuarials were most likely in the possession of Otsego.

d. Finally, the very veracity of Otsego County's February 25, 2002 FOIA response was suspect. Otsego County's February 25, 2002 FOIA response only disclosed the existence of three MERS actuarials dated December 1, 2001. (Brief Ex 16). Otsego County's February 25, 2002 FOIA did not disclose the existence of either the May 22, 2000 or the January 1, 2001 MERS actuarials [Brief Exs 7 and 11]. **However, Counsel for Crawford and Kalkaska was fully aware, based upon the face of Otsego County's own Resolution implementing the MERS B-4 Plan, that Otsego County had in it's possession or had knowledge of the data contained in the January 1, 2001 MERS actuarial which was NOT provided to Crawford in the FOIA Response, which WAS NOT shared with Crawford or Kalkaska prior to Otsego's implementation of the MERS B-4 Plan, and which reflects contribution rates FAR**

EXCEEDING THE RATE represented by the Unified Court. (Brief Ex 11)

13. What was UNKNOWN to me -- prior to the filing of this action – was the fact that the Court's Administrator Rudi Edel had "filed" in his office all six of the MERS May 22, 2000 actuarial studies which, based upon the employee census provided by the Court Administrator, reflected that the first year cost of the proposed MERS B-4 Plan would vary between 18% and 21% of payroll. (Brief Ex 20, pp 92, 96; Brief Ex 7). Further, only through discovery in this case was I made aware that just as Mr. Edel failed to reveal the existence of or provide NINE MERS actuarials to Crawford or Kalkaska, and rather, kept these documents secreted in his desk, he also failed to disclose six (6) of the nine (9) Actuarials to Otsego. (Id.) **Based upon this revelation discovered in the March 10, 2003 deposition of Lambert Chard and confirmed in the March 12, 2003 deposition of Rudi Edel, Crawford and Kalkaska stipulated in its April 23, 2003 Brief to the dismissal of Count III of Plaintiffs' Complaint against Otsego.**
(See Toskey Affidavit at Appendix 16)

Nonetheless, the lower court, without conducting an evidentiary hearing, agreed with Otsego, ruling that the fraud claim was pleaded without proper investigation of the facts, because Otsego claimed in blatant violation of MERS requirements and its own certification to MERS, that it had never in fact possessed nor reviewed the January 1, 2001 MERS

actuarial study, even though its certification was a prerequisite to MERS' implementation of B-4 pension (Appendix 14).

Additional facts will be adduced as pertinent to specific issues and arguments.

ARGUMENT

I. THE LOWER COURT ERRED IN SUMMARILY DISMISSING CRAWFORD AND KALKASKA'S COMPLAINT FOR DECLARATORY RELIEF REFERENCING THE UNIFORM BUDGETING AND ACCOUNTING ACT (UBAA), MCL 141.421 *ET SEQ*, FOR LACK OF STANDING

Standard of Review

" 'Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation; an interest that will assure sincere and vigorous advocacy.' " *Allstate Ins Co v Hayes*, 442 Mich 56, 68; 499 NW2d 743 (1993) (internal citations omitted). Whether a party has standing is a question of law reviewed *de novo* on appeal. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

Summary disposition under MCR 2.116(C)(5), based on lack of standing, is, like all summary disposition issues, reviewed *de novo*, requiring consideration of "the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Wortelboer v Benzie Co*, 212 Mich App 208, 213; 537 NW2d 603 (1995). This *de novo* review of the case requires drawing all inferences in the light most favorable to Crawford and Kalkaska, and then determining if they either pleaded or established facts that would give them

standing to sue for declaratory relief. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000).

A circuit court's decision on a claim for declaratory relief is also independently subject to *de novo* review. *Seventeenth District Probate Court v Gladwin County*, 155 Mich App 433, 456; 401 NW2d 50 (1986).

Analysis

A. No Claim for Relief Under or Enforcement of the UBAA Was Made, However, Assuming *Arguendo* that Such a Claim was Made under the UBAA, Declaratory Relief Is Properly Sought, Even When A Party Lacks Standing To Seek Or Obtain Other Forms of Relief.

Counts I and II of Crawford and Kalkaska's Complaint, the only parts referring to the UBAA at all, were captioned "Declaratory Judgment" and "Declaration THAT OTSEGO EXCEEDED ITS AUTHORITY." To obtain declaratory relief, it is not only unnecessary that a party have standing to sue for any other form of relief, whether injunctive, damages, or other legal or equitable relief, based on the same facts, it is actually preferred (under existing Michigan jurisprudence) that there be no other form of remedy available to the plaintiff seeking a declaratory judgment. MCR 2.605(A)(1) provides:

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, **whether or not other relief is or could be sought or granted**.

(Emphasis added)

If Crawford and Kalkaska counties had standing to pursue any other civil relief under the UBAA, then declaratory judgment would have been unavailable to them. *Miller v Siden*, 259 Mich 19, 20; 242 NW 823 (1932). Lack of standing to seek either damages, injunction, mandamus, or any other form of civil relief under the UBAA directly against Otsego County was thus a necessary prerequisite of Crawford and Kalkaska's pursuit of declaratory relief. Standing relating to the UBAA would potentially be at issue only if, after declaratory relief in their favor, Crawford and Kalkaska then sought further relief. *See Barry County Probate Court v Dep't of Social Services*, 114 Mich App 312, 319; 319 NW2d 571 (1982) (holding that after declaratory relief is granted, further relief, such as an injunction, may then be granted if necessary or proper).

Miller v Siden, supra, has never been overruled explicitly. However, when last cited by the Michigan Supreme Court, *Miller* was mentioned in the context of explaining promulgation of the predecessor to MCR 2.605, *i.e.*, GCR 1963, 521, and the Supreme Court noted that one purpose of replacing the former declaratory judgment statute, CL 1948, 691.501-.507 (repealed with adoption of the Revised Judicature Act in 1963) was *to **expand** the use of the declaratory judgment procedure. Allstate Ins Co v Hayes*, 442 Mich 56, 65 ff and n 8; 449 NW2d 743 (1993). Since, prior to the promulgation of GCR 1963, 521, *Miller v Siden* stood as a bar to use of the declaratory judgment process unless a party lacked standing to pursue any other civil remedy, and under the court rule the use of the declaratory judgment procedure is intended to be expanded, not contracted in any way, then *a fortiori* under MCR 2.605 Crawford and Kalkaska Counties, which cannot obtain any

other form of civil relief under the UBAA, can pursue declaratory relief under the UBAA.

Indeed, the Supreme Court has recently reaffirmed the *Miller v Siden*, holding in *Associated Builders & Contractors v Director, DCIS*, 472 Mich 117; 693 NW2d 374 (2005)[2], that a declaratory action was improperly dismissed for want of a proper case or controversy. After first noting that the "actual controversy" requirement of MCR 2.605(A)(1) turns on justiciability, which is " not a legal concept with a fixed content or susceptible of scientific verification," slip op., p 9 n 9, quoting *Poe v Ullman*, 367 US 497, 508-509; 81 S Ct 1752; 6 L Ed 2d 981 (1961), the Court found that the **plaintiff private organization had standing to litigate the application of a criminal statute, even though no prosecution was imminent or threatened, in order to guide its own future conduct,** 472 Mich at 127-128:

> It has been conceded by the defendant prosecutor that it must enforce the PWA.17 But regardless, neither *Lee, supra*, nor the plain text of MCR 2.605 requires a plaintiff regulated by a criminal statute to submit evidence of a threat of imminent prosecution in order to establish standing. It is sufficient to establish standing under *Lee, supra*, that the members of plaintiff

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[2] Crawford and Kalkaska brought this case, which was issued three weeks after oral argument in the Court of Appeals, to the attention of the Court of Appeals by means of a supplemental filing under MCR 7.212(F), but the Court of Appeals completely ignored this controlling authority, refusing to cite or even to attempt to distinguish it.

> business association are directly regulated by the PWA and must conform their pay and benefit practices to that of union contractors on state-funded projects under the statute. [footnote 18 omitted]
>
> Plaintiff's members suffer a concrete, rather than a hypothetical, injury because they either face criminal prosecution for a violation of the statute or must avoid state-funded work entirely. [footnote 19 omitted] Such evidence establishes the existence of a legally protected interest, causation, and redressibility as required by *Lee, supra.*

Here, identically, Crawford and Kalkaska sought declaratory relief, in part, with respect to the possibility that Otsego's implementation of the disputed pension plan would cause them to engage in deficit spending, in violation of the UBAA (thus exposing *themselves* to adverse action by the Attorney General or prosecutor). Not only did Crawford and Kalkaska have proper standing to do so (irrespective of the fact that only a prosecutor or the Attorney General can *directly* enforce the UBAA, just as only a prosecutor can directly bring criminal charges under the PWA), thus not only making summary disposition clearly erroneous, but correlatively establishing beyond peradventure that Crawford and Kalkaska's legal counsel certainly acted within the scope of vigorous advocacy in so pleading—their position was then, and remains, supported by *at least* a good faith argument for application, modification, or extension of existing legal principles, making the imposition of sanctions *a fortiori* erroneous. *Kitchen v Kitchen*, 465 Mich 654, 662-663; 641 NW2d 245 (2002); *Stablein v Shuster*, 183 Mich App 477, 483; 455

NW2d 315 (1990); *Louya v William Beaumont Hosp*, 190 Mich App 151, 163-164; 475 NW2d 434 (1991).

Especially is this so when the core concept of justiciability lacks fixed content counsel could reasonably and reliably divine, *Poe, supra*, and when Otsego waived the issue under MCR 2.116(D)(2) (see below).

B. All Other Prerequisites to Declaratory Relief Are Satisfied Here, and Crawford and Kalkaska Had Proper Standing To Seek Declaratory Relief Under MCR 2.605(A).

All other requirements for seeking declaratory relief are unquestionably satisfied here. There is an actual controversy between Crawford and Kalkaska on the one hand, and Otsego on the other. The circuit court is a court of record. The lower court had proper *in personam* jurisdiction over all three counties (Crawford and Kalkaska had already been sued and served with process by the 46th Trial Court; Otsego was served with the summons and complaint in due course), and, there being no statute granting exclusive jurisdiction to another court or otherwise depriving the circuit court of jurisdiction, the lower court also had proper subject matter jurisdiction. Const 1963, art 6, §13; MCL 600.605. Thus, in *State ex rel Prosecuting Attorney for Ingham County v American Amusement Co, Inc*, 71 Mich App 130, 135; 246 NW2d 684 (1976), the Court reasoned:

> Circuit courts have original jurisdiction to determine all civil claims and remedies except as otherwise provided. Const.1963, art. 6, s 13, M.C.L.A. 600.605; M.S.A. §27A.605. There is an assumption of jurisdiction by the circuit court,

> unless the matter in question is specifically excluded by law.

In *Joy v. Two-Bit Corp.*, 287 Mich. 244, 253--254, 283 N.W. 45, 48 (1938), the Court quoted approvingly from *Richardson v. Ruddy*, 15 Idaho 488, 494-495, 98 P. 842 (1908), in explaining subject matter jurisdiction:

> "Jurisdiction over the subject-matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial."

Thus, all the prerequisites to declaratory relief specified in MCR 2.605 were extant when the claim in Case No. 02-10014-CZ and cross-claim in Case No. 02-5291-CZ were filed.

Moreover, the request for declaratory relief was not actually based on the UBAA, other than passively, in the sense that the counter-complaint asserts in ¶89 that Crawford appropriated a maximum sum pursuant to the UBAA, and cannot be deemed to have appropriated more[3]. The UBAA

[3] Additionally, if anything, the UBAA was being utilized as a shield, not a sword—Crawford and Kalkaska counties were seeking a declaration that they could not be compelled to violate the UBAA by engaging in deficit

was neither cited nor relied upon as the basis for declaring either an appropriation unlawful or any action by Otsego County as unlawful. Substantive relief was sought based on Otsego County's violation of MCL 600.8271, in that Otsego was claimed in ¶88 to have caused Crawford to exceed the budget allocation made by Crawford without prior approval of either Crawford or Kalkaska. Crawford and Kalkaska had proper standing to invoke MCL 600.8271(6), *Branch County Bd of Comm'rs v Service Employees Union, Local 506*, 168 Mich App 340, 347-349; 423 NW2d 658 (1988), and to contest expenditures as exceeding appropriations made, *ibid* at 349 ff.

C. A Party Has Proper Standing to Seek Declaratory Relief If a Favorable Decree May Lead To Beneficial Action Either By the Defendant Or a Third Party.

A declaratory action is appropriate where a judgment is needed to stabilize an uncertain or disputed legal relation, or where the judgment is needed to guide a party's future actions in order to preserve its legal rights. *Allstate Ins Co v Hayes*, 442 Mich. 56, 74; 499 NW2d 743 (1993). A trial court is not precluded from reaching an issue before an actual injury has occurred; however, a trial court cannot decide a hypothetical issue. *Shavers v Attorney General*, 402 Mich 554, 588-589; 267 NW2d 72 (1978). Therefore, in determining whether to issue a declaratory judgment, a court must first be satisfied that an "actual controversy" has been presented. *Id.*; MCR 2.605.

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spending or spending beyond appropriations. Crawford and Kalkaska could hardly ask the attorney general or prosecutor to intervene to stop *themselves* from such unlawful spending.

Declaratory actions have also been recognized as proper vehicles when the plaintiff wants a change in the defendant's conduct but believes that it will ensue from a declaration of the plaintiff's rights, and by seeking just the declaration the plaintiff avoids the burden of formulating and justifying a precise injunctive remedy, or as a method of depriving the defendant of delay as a weapon. *Bontkowski v Smith*, 305 F3d 757, 761 (CA 7, 2002); *see also City of Lake Angelus v Michigan Aeronautics Comm'n*, 260 Mich App 371, 376-377; 676 NW2d 642 (2004).

The issue of whether Otsego County's actions do (or did) or do not (or did not) cause Crawford and Kalkaska to violate their balanced budget obligations and other requirements of the UBAA is plainly justiciable. Even Judge Kolenda recognized that either a prosecutor or the attorney general could plead a justiciable claim under the UBAA. Once justiciability is thus established, standing requirements for seeking declaratory relief should be relaxed. As the late Judge Beasley noted in *Michigan Licensed Beverage Ass'n v Behnan Hall, Inc*, 82 Mich App 319, 331; 266 NW2d 808 (1978) (Beasley, J, dissenting):

> In analyzing the standing issue, I would start with the proposition that where, as here, there is a genuine justiciable issue, that is, the assertion of a claim of right against one who has an interest in contesting it, [FN3] the law should favor that interpretation which grants standing to obtain resolution of the issue. Judicial review of justiciable issues should be freely available with the least judicial encumbrance.[FN4]

> FN3. Black's Law Dictionary (4th Ed.), p. 1004.
>
> FN4. See 75 Harvard L Rev 255, 257-258 (1961), citing *FCC v Sanders Brothers Radio Station*, 309 US 470; 60 S Ct 693; 84 L Ed 869 (1940).

Moreover, Judge Beasley would apply what is now MCR 2.601(A) (with MCR 2.605(F)) to broadly construe the complaint so as to give the plaintiff any relief that might be proper, even if the plaintiff sought only improper or otherwise unavailable relief:

> Therefore, I would agree with the majority that injunctive relief was not proper in the within case on the facts indicated in the record. However, I would treat plaintiff's cause as an action for declaratory judgment [FN11] and would find standing in plaintiff to seek an authoritative, binding interpretation of section 26c of the Liquor Control Act as it relates to the allegedly unlawful activities of defendant. I would address that issue as to the statute's meaning; but since this is a dissent, no good purpose will be served by further comment.
>
> FN11. GCR 1963, 521; *Kuhn v East Detroit*, 50 Mich App 502, 504; 213 NW2d 599 (1973).

Id., 82 Mich App at 335.

At that time, Section 26c of the Liquor Control Act, MCL 436.26c, provided:

> No person shall maintain, operate, lease or otherwise furnish to other persons any premises or place which is not licensed under this act, wherein such other persons may engage in the drinking of alcoholic beverages, for a fee or for any other consideration including the sale of food, mixers, ice or other fluids used with alcoholic drinks or the storage of alcoholic liquors: Provided, That the provisions of this section shall not apply to any hotel nor to any licensee under the provisions of this act: Provided further, That the provisions of this section shall not be construed to repeal or amend the provisions of section 26b of this act.

There, as here, despite the fact all violations of the Liquor Control Act were crimes, and only the prosecutor had standing to directly enforce a violation, MCL 49.153, a private party was recognized as having standing to seek declaratory relief. Thus, Judge Beasley's position presaged MCR 2.605(F) as well as *Associated Builders*.

Judge Beasley's position is supported by the Seventh Circuit's decision in *Bontkowski v Smith, supra*, 305 F3d at 762: And even if the district court was right that Bontkowski is seeking relief to which he's not entitled, this would not justify dismissal of the suit. Although Rule 8(a)(3) of the civil rules requires that a complaint contain "a demand for judgment for the relief the pleader seeks," the demand is not itself a part of the plaintiff's claim, *Laird v Integrated Resources, Inc*, 897 F2d 826, 841-42 and n. 69 (5th Cir.1990); *Schoonover v Schoonover*, 172 F2d 526, 530 (10th Cir.1949); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1255 (2d

ed.1990), and so failure to specify relief to which the plaintiff was entitled would not warrant dismissal under Rule 12(b)(6) (dismissal for failure to state a claim). Any doubt on this score is dispelled by Rule 54(c), which provides that a prevailing party may obtain any relief to which he's entitled even if he "has not demanded such relief in [his] pleadings." See *Holt Civic Club v City of Tuscaloosa*, 439 US 60, 65-66, 99 S Ct 383, 58 L Ed 2d 292 (1978); *Old Republic Ins. Co v Employers Reinsurance Corp.*, 144 F3d 1077, 1081 (7th Cir.1998); *Felce v Fiedler*, 974 F2d 1484, 1501-02 (7th Cir.1992); *Lehman v Revolution Portfolio LLC*, 166 F3d 389, 394 (1st Cir.1999); *Pension Benefit Guaranty Corp. v East Dayton Tool & Die Co*, 14 F3d 1122, 1127 (6th Cir.1994). It would be appropriate and indeed quite sensible for a judge confronting a complaint that does not demand proper relief to ascertain whether the plaintiff wants the improper relief sought in the complaint or nothing; if so, the complaint must be dismissed. But there is no indication that Bontkowski has his heart set on declaratory and injunctive relief. That would make no sense. Obviously he wants his Dali prints back or, if they've been sold, the proceeds.

That a declaratory action, aimed at affecting the conduct of a third party who is not participating in the litigation, is perfectly proper and viable is also reflected in *Frederick County Fruit Growers Ass'n v Martin*, 968 F2d 1265, 1269-1272 (CA DC, 1992), where the court ruled that the growers could not challenge an earlier declaratory ruling which had required the Department of Labor to reinterpret its wage-correlation methodology under a job clearance system for foreign workers, even though the effect of this reinterpretation had been to increase the growers' liability and the growers had not been parties to the earlier ruling.

Similarly, in *Joseph v Department of Labor*, 787 F Supp 245, 246 (Dist Col, 1991), the court ruled that plaintiffs' challenge to the Department of Labor's failure to set a prevailing wage rate for sugar cane cutters in the 1990-91 season was not moot, because plaintiffs could later sue the growers who had employed them during that season for backpay.

To like effect is *Allstate Ins Co v Hayes, supra*, where the Michigan Supreme Court determined that an actual controversy existed between defendant insurer and the injured party because the very nature of declaratory relief is to declare interests not yet vested. 442 Mich at 63. The interest that was "not yet vested," but nonetheless a possibility, was the injured party's possible recovery against the insured, and then a subsequent garnishment action against the insurer. *Id.* at 61. **Thus, use of a declaratory judgment action as a prelude to seeking further relief elsewhere is an accepted usage of the declaratory format.**

The most prominent case to suggest the independent sufficiency of prospective remedial benefit is *Duke Power Company v Carolina Environmental Study Group*, 438 US 59; 98 S Ct 2620; 57 L Ed 2d 595 (1978). The facts can be compressed into short compass. Provisions of the Price-Anderson Act limit maximum liability in the event of any single nuclear incident to $560,000,000. Plaintiffs, who lived near two nuclear power plants being constructed by a privately owned utility, were accorded standing to sue the Nuclear Regulatory Commission for a declaratory judgment as to the validity of those provisions. The injury relied upon to give standing arose from the environmental and aesthetic consequences that would result from actual operation of the plants. The next steps of the standing inquiry then were compressed into inquiring

whether this injury "'fairly can be traced to the challenged action of the defendant,' " "or put otherwise," whether there "is a 'substantial likelihood that the relief requested will redress the injury.' " 438 US at 74-75 & n. 20; 98 S Ct at 2631 & n. 20. **Likely redress of the environmental injuries was found in the prospect that if a judgment were entered against the NRC declaring the liability limitation invalid, the utility would abandon the plants, unfinished and unoperated.**

The key aspects of the *Duke Power* decision can be described in many ways. No remedy at all was contemplated as to the utility itself. Any benefit to the plaintiffs would have come, if at all, **from the utility's independent reaction to a declaratory judgment entered against someone else**. The environmental and aesthetic benefits, moreover, were not connected in any way to the theories advanced to challenge the liability limitation. To the contrary, there is nothing to contradict the assumption that all of the environmental and aesthetic consequences of operating the plants would be the lawful results of lawful operations.

Here, too, no direct or immediate remedy as to the prosecutor or attorney general was sought or in prospect, but the reasonable expectation that a favorable declaration as to Otsego County's lack of compliance with the requirements of the UBAA would be persuasive in seeking prosecutorial intervention (if it did not convince Otsego to mend its ways without awaiting such intervention) should have been sufficient to confer standing on Crawford and Kalkaska Counties.

Even though the effect of declaratory relief on the key action of non-parties is somewhat speculative, the declaratory

judgment procedure may still be properly invoked, as illustrated by *Committee for Full Employment v Blumenthal*, 196 US App DC 155; 606 F2d 1062, 1066-1067 (1979). There, the complaint asserted that the Secretary of the Treasury had failed to process promptly complaints of discrimination by state and local government recipients of revenue sharing funds. **The court found standing even for plaintiffs who had never filed complaints with the Secretary. The fact that the plaintiffs would receive a benefit only through the actions of nonparties was found not controlling; it was enough that they had "adduced facts, uncontradicted by the government, that tend to show that the recipient governments would end discrimination rather than risk the loss of revenue sharing funds."** Here, Crawford and Kalkaska Counties reasonably anticipated that Otsego County would voluntarily conform its conduct regarding its budgeting and disbursement practices rather than risk an enforcement action by the prosecutor or attorney general.

Utah v Evans, 536 US 452, 459-464; 122 S Ct 2191, 2197-2199; 153 L Ed 2d 453 (2002) **demonstrates conclusively that the prospect a declaratory judgment will positively affect the actions of third persons not before the court is sufficient to confer standing.** There, the use of "hot-deck imputation" by the Census Bureau in the 2000 Census resulted in shifting one seat in the House of Representatives from Utah to North Carolina. By January 16, 2001, the President had certified the Census results and the Clerk of the House of Representatives had certified to each state its number of representatives. Utah sued the Secretary of Commerce, solely seeking injunctive and declaratory relief concerning the use of hot-deck imputation. The Supreme Court found it "likely that Utah's victory here would bring about the ultimate relief that Utah seeks." It was substantially likely that a revised report from the Secretary to

the President would cause the President and Congressional officials to abide by the Court's authoritative interpretation. **The Supreme Court thus held that standing can be established by showing that "the practical consequence [of the Court's order] * * * would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered."** Cases that have denied standing "involved a significantly more speculative likelihood of obtaining ultimate relief." (*N.B.* Utah lost on the merits, making pellucidly clear that standing must be analyzed without regard to the substantive issues raised).

A surprising denial of standing was reversed in *Stehney v Perry*, 101 F3d 925, 929-931 (CA 3, 1996). The National Security Agency revoked the plaintiff's security clearance when she refused to take a polygraph test as part of a periodic review of her clearance. Her job doing cryptological research for a private firm under contract with the government required a security clearance, so she was fired. The trial court dismissed her claim that the Agency failed to follow its own regulations for lack of standing, observing in part that her employer was not obliged to rehire her even if her clearance were restored. The Third Circuit easily concluded that she had standing, relying in part on *Greene v McElroy*, 360 US 474; 79 S Ct 1400; 3 L Ed 2d 1377 (1959). Although standing concepts had changed since *Greene*, the plaintiff readily satisfied current tests as well. She had suffered injury in her employment caused by termination of her clearance, and the injury was "likely to be redressed by a favorable decision, because NSA would undoubtedly conduct a new review" if ordered to do so. Similarly, here Crawford and Kalkaska Counties anticipated reasonably that the county prosecutors or the attorney general would more critically review their own compliance with the UBAA and possibly intervene to preclude

Crawford and Kalkaska (with only ancillary attention to Otsego) from contributing unappropriated funds towards the B-4 pension plan.

The concepts of past injury in fact and future remedial benefit can become interdependent in the cases that involve no more than denial of an opportunity, the ultimate effect of which may be nugatory. Sufficient illustration is provided by *Watt v Energy Action Educational Foundation*, 454 US 151; 102 S Ct 205; 70 L Ed 2d 309 (1981). California was allowed to pursue a claim that the Secretary of the Interior was required by statute to experiment with different royalty systems in leasing offshore gas and oil production rights. It was possible that after the experiment, the Secretary would continue to use the present royalty system without change. Nonetheless, it was possible that he would adopt a system more favorable to California. Here, likewise, the prosecutor or attorney general would be more likely to act against Otsego if given "vertebrae reinforcement" (more backbone) by a declaratory judgment. Therefore, suit for declaratory judgment aimed at prodding Otsego to correct its behavior or prompting the prosecutor or attorney general to file suit under the UBAA was perfectly proper, and the lower court erred in dismissing the claims against Otsego.

D. The Lower Court Further Erred In Raising the Issue of Standing *Sua Sponte*.

Aside from the errors of law already identified, the lower court also erred in *sua sponte* considering the issue of standing. MCR 2.116(D)(2) requires that a challenge to lack of standing (which is properly brought pursuant to MCR 2.116(C)(5)) "must be raised in a party's first responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading." **Otsego**

never raised the issue in either its first responsive pleading or even in its *subsequently* filed motion for summary disposition, and thus waived it as a defense.

The Court of Appeals took it upon itself in usurpation of the rule-making power which only this Supreme Court possesses, Const 1963, art 6, §5) to repeal MCR 2.116(D)(2). The Court of Appeals, citing only its overruled decision in *Kaiser v Schreiber*, 258 Mich App 357, 369-371; 670 NW2d 697 (2003), *reversed* 469 Mich 944; 670 NW2d 671 (2003) and MCR 2.116(D)(3) (which by its terms does not allow standing to be raised at any time) (Appendix 1, p 17), held that standing may be raised as a (C)(8) summary disposition motion.

Kaiser, as cited by the Court of Appeals, was the opinion of Judge Sawyer, in which Judge Schuette concurred separately. But Judge Sawyer, whether his decision is that of a majority (and thus binding precedent under MCR 7.215(C)(2) and)(I)(1)) or not, actually wrote:

> Furthermore, a conclusion that standing is an issue most properly raised in a motion brought under MCR 2.116(C)(5) is consistent with our decision in *Altman, supra*. Ultimately, however, it appears that we need not resolve the issue whether standing may be challenged under MCR 2.116(C)(8).

258 Mich App at 370. Thus, *Kaiser* provides no support for the Court of Appeals' decision in this case. Under *Kaiser*, (a) standing may only be raised as a (C)(5) summary disposition motion either initially or after being preserved by way of a first responsive pleading per MCR 2.116(D)(2), or (b) alternatively *Kaiser* did not decide such an issue at all, or (c) whatever *Kaiser*

says is plainly, by *Kaiser*'s own lights, *obiter dictum*.

Meanwhile, the court rules are quite explicit if standing is not raised in a first responsive pleading, or a summary disposition motion that **precedes** a first responsive pleading, it is waived. MCR 2.116(C)(5); (D)(2). To both eliminate those rules *ex post facto* in contravention of the Supreme Court's exclusive rule-making powers, and then to sanction Crawford, Kalkaska and their counsel for failing to anticipate such a future usurpation of the Supreme Court's rulemaking powers, is an obscenity, a stunning perversion of law and equity that cannot be countenanced.

II. EVEN IF THE REQUEST FOR DECLARATORY RELIEF WAS PROPERLY SUMMARILY DISMISSED, THE PLEADING WAS NOT FRIVOLOUS AS NO COURT HAD RULED ON THE ISSUES, AND THE LOWER COURT ERRED IN SANCTIONING COUNSEL FOR HAVING RAISED THE MATTER.

Standard of Review

Appellate review of the imposition of sanctions for "frivolous pleading" is for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). Note that in *Kitchen*, the Supreme Court nonetheless reversed based on an independent *de novo* determination that there was enough arguable merit to avoid sanctions for frivolous pleading. 465 Mich at 662. The clear error standard thus applies *only* to factual determinations here, there have been no factual determinations, because no evidentiary hearings on the issue have been held, and the Court has ruled summarily.

The application of law to fact is an issue of law also reviewed *de novo*. *Centennial Health Care Mgmt Corp v Mich Dep't of Consumer & Industry Services*, 254 Mich App 275, 285; 657 NW2d 746 (2002), citing *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997). In *Miller v Wokas*, 468 Mich 882; 661 NW2d 231 (2003)[4], the Supreme Court recently applied *de novo* review in peremptorily reversing an award of sanctions, where the Court of Appeals had adjudged the complaint frivolous. To the extent sanctions turns on the interpretation of a court rule, that presents a question of law also reviewed *de novo*. *Dessart v Burak*, 252 Mich App 490, 494; 652 NW2d 669 (2002).

Analysis

A. OTSEGO'S FAILURE TO RAISE THE ISSUE OF STANDING IN EITHER ITS ANSWER AND AFFIRMATIVE DEFENSES OR ITS MOTION FOR SUMMARY DISPOSITION IS EVIDENCE THAT THE PLEADING WAS NOT FRIVOLOUS AND A SUFFICIENT GOOD FAITH ARGUMENT IN SUPPORT OF DECLARATORY RELIEF WAS MADE TO PRECLUDE THE IMPOSITION OF SANCTIONS FOR "FRIVOLOUS PLEADING"

If, as demonstrated in Issue I, the lower court erred in summarily dismissing the counts of the complaint seeking declaratory relief for lack of standing, then the finding that such claim was frivolous falls *de jure*. But assuming *arguendo* that the Supreme Court sustains the underlying ruling,

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[4] The decision is precedential. *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993).

nonetheless, the finding that the claim was frivolous should certainly be vacated.

> **Frivolousness for purposes of MCL 600.2591 or MCR 2.114(E) is determined as of the time a complaint is filed, *not* later.** *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22,36; 666 NW2d 310 (2003); *Meagher v Wayne State Univ*, 222 Mich App 700 727; 565 NW2d 401 (1997). The purpose of §2591 is "to sanction attorneys and litigants who file lawsuits or defenses without reasonable inquiry into the factual basis of a claim or defense, **not to discipline those whose cases are complex or face an 'uphill fight.'** " *Louya v William Beaumont Hosp*, 190 Mich App 151, 163-164; 475 NW2d 434 (1991). (Emphasis added)

No more than a good faith belief, or a good faith argument for a modification or extension of existing law, is needed to avoid sanctions. As held in *Kitchen v Kitchen, supra*, 465 Mich at 662:

> The issue whether plaintiffs should be subject to sanctions is much closer than the Court of Appeals made it appear. Although plaintiffs' claim for an irrevocable license must ultimately fail, plaintiffs presented a sufficient argument grounded in law and fact to avoid a finding of frivolity. The mere fact that plaintiffs did not ultimately prevail does not render the supplemental complaint frivolous.

The Court in *Kitchen* went on, *Id.* at 663, to note that citing authority from another jurisdiction will suffice to avoid sanctions for a frivolous pleading:

> Plaintiffs point out accurately that there is support for their position in authorities from other jurisdictions and in the Restatement of Property. 5 Restatement Property, § 519(4). * * * Not every error in legal analysis constitutes a frivolous position. Moreover, merely because this Court concludes that a legal position asserted by a party should be rejected does not mean that the party was acting frivolously in advocating its position.

Kitchen also continues, *Id.* at 663, importantly, by expressly noting that sanctions are properly reversed on appeal where a convincing argument is made by the sanctioned party, even if that analysis is superior to that presented to the trial court:

> We recognize that plaintiffs' argument before this Court is more refined than that made before the trial court. [FN8 omitted] Nonetheless, we conclude that plaintiffs' initial allegations and legal argument were sufficient to avoid sanctions for a frivolous lawsuit. Thus, the circuit court clearly erred in its award of sanctions predicated on finding the suit frivolous.

And, as the Court of Appeals correctly recognized in *Stablein v Shuster*, 183 Mich App 477, 483; 455 NW2d 315 (1990):

> In this case, while plaintiffs' arguments fail, given the Supreme Court's opinion in *Rouch*, we hesitate to conclude that plaintiffs' claim does not represent a good faith argument for the extension or modification of existing law. MCR 2.114(D)(2).

The United States Supreme Court has similarly recognized that if a party can find any legal authority to support its position, or even argue merely that controlling authority in its own jurisdiction was wrongly decided, then its pleadings cannot be held to be frivolous. *McKnight v General Motors Corp*, 511 US 659, 660; 114 S Ct 1826; 128 L Ed 2d 655 (1994).

Issue I above demonstrates that a good faith argument, amply supported by authority, supports the standing of Crawford and Kalkaska to seek declaratory relief with reference to the UBAA. Moreover, the very fact that Otsego's highly experienced counsel failed to recognize or assert the standing issue in timely fashion (until four months after filing his first responsive pleadings, and two months after moving for summary disposition, it was suggested to him by the presiding judge) is ample evidence on its face that the pleading was not frivolous. It was clear error to find such a claim "frivolous."

III. THE LOWER COURT ERRED IN SANCTIONING THE PARTIES AND THEIR COUNSEL FOR HAVING ASSERTED A CLAIM OF FRAUD WITHOUT ANY FACTUAL SUPPORT WHERE THE CLAIM WAS PREDICATED ON THE CRUCIAL ADMISSION BY OTSEGO COUNTY IN ITS AUGUST 14, 2001 MERS

RESOLUTION

Standard of Review

Appellate review of the imposition of sanctions for "frivolous pleading" is for clear error. *Kitchen v Kitchen, supra,* 465 Mich at 661. Note, again, that in *Kitchen,* this Honorable Court nonetheless reversed based on an independent *de novo* determination that there was enough arguable merit to avoid sanctions for frivolous pleading. 465 Mich at 662. The clear error standard thus applies *only* to factual determinations. Here, there have been no factual determinations because no evidentiary hearings on the issue have been held, and the lower court has ruled summarily.

The application of law to fact is an issue of law also reviewed *de novo. Centennial Health Care Mgmt Corp v Mich Dep't of Consumer & Industry Services, supra,* 254 Mich App at 285, citing *Schroeder v Detroit, supra,* 221 Mich App at 366. In *Miller v Wokas, supra,* 468 Mich 882, the Supreme Court applied *de novo* review in peremptorily reversing an award of sanctions, where the Court of Appeals had adjudged the complaint frivolous. To the extent sanctions turn on the interpretation of a court rule, that presents a question of law also reviewed *de novo. Dessart v Burak, supra,* 252 Mich App at 494.

Frivolousness for purposes of MCL 600.2591 or MCR 2.114(E) is determined as of the time a complaint is filed, *not* later. *Jerico Constr, Inc, supra.* The purpose of §2591 is "to sanction attorneys and litigants who file lawsuits or defenses without reasonable inquiry into the factual basis of a claim or defense, not to discipline those whose cases are complex or face an 'uphill fight.' " *Louya v William Beaumont Hosp, supra,*

190 Mich App at 163-164. "The circumstances existing at the time a case is commenced is[5] of critical importance in determining if a lawsuit has a basis in fact or law." *Meagher v Wayne State Univ, supra,* 222 Mich App at 727.

Analysis

A. Contrary To the Lower Court Rulings, the Claims Of Fraud Against Otsego Were Not Without Factual Foundation When Filed, and It Was Clear Error To Impose Sanctions.

As Otsego's own August 14, 2001 resolution ADMITS, Otsego did have the benefit of knowledge of a January 1, 2001 MERS Actuarial Valuation (possession of which it had denied in its FOIA response) when it approved implementation of the B-4 pension plan (Appendix 14). There was, in fact, a January 1, 2001 MERS Actuarial Valuation, although it had been provided to the 46th Circuit Trial Court, and it reflected that the cost of the B-4 plan was triple what had been represented by Chief Judge Davis to all three boards of commissioners.

It was this formal Otsego admission, combined with its subsequent contradictory FOIA disclosure (counsel for Crawford and Kalkaska knew from MERS' FOIA disclosure that either Otsego or plaintiff was lying about actuarials, or both were lying) that underlay Crawford and Kalkaska's fraud charge. Inasmuch as Otsego's resolution was in the form of a contract with MERS importantly, a contract which, being duly authorized by Otsego's Board of Commissioners and signed and certified by the county clerk, is expressly authorized by

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[5] [*Sic*] are.

statute, MCL 46.12a Otsego's factual certification to MERS that it had enjoyed the benefit of reviewing the cost data set out in the MERS' January 1, 2001 Actuarial Valuation was properly understood by Crawford and Kalkaska and their counsel as *conclusive and binding* on Otsego. As the Supreme Court held in *Acme Cut Stone Co v New Center Dev Corp*, 281 Mich 31, 47; 274 NW 700 (1937):

> This court has held:
> 'When resorted to in drafting contracts, recitals serve as a preface or preliminary statement introducing the subject in relation to which the parties contract, indicating to a greater or less degree the reason for and intent of what follows. Recitals are of two kinds, particular and general. **Particular recitals involving a statement of fact are, as a rule, to be treated as conclusive evidence of the facts stated**; while general recitals may not be.' *Thomson Electric Welding Co v Peerless Wire Fence Co*, 190 Mich 496; 157 NW 67, 69.

(Emphasis added)

Accord: *Detroit Grand Park Corp v Turner*, 316 Mich 241, 251; 25 NW2d 184 (1946).

Here, Otsego's admission regarding the January 1, 2001 MERS Actuarial Valuation was particular, not general. This conclusion is only reinforced by the boldface adjuration within the Resolution itself, quoted *supra* at p. 7 of this Brief, that announces MERS will not accept or implement such a resolution, unless the Board has had the benefit of a current (less than one year old) actuarial valuation by MERS' own

actuary[6]. Such assertions of present or past fact are properly considered contractual in nature. *BSBSM v Paul*, 174 Mich App 188, 193-194; 435 Mich 420 (1988).

But whether or not contractual, and whether or not conclusive, such an admission provides all the factual basis necessary to defeat a claim for sanctions predicated on MCR 2.114(D) and (E). The lower court, in imposing sanctions on counsel for Crawford and Kalkaska, has given no heed to the crucial principle of Michigan jurisprudence concerning a lawyer's conduct in representing a client in our adversarial system a lawyer must represent the client zealously, MRPC 2.1, and *in doing so owes no duty of care to an opposing party. Friedman v Dozorc*, 412 Mich 1, 22-26; 312 NW2d 585 (1981). Imposition of sanctions is always improper if it might chill an attorney's vigorous pursuit of the client's rights. As the Court of Appeals said in *Louya v Wm Beaumont Hosp, supra*, 190 Mich App at 162-3:

> In our view, the statute at issue [MCL 600.2591] and the rules of professional conduct should be read in harmony, if possible, to avoid the anomalous result of holding a lawyer personally liable for an opponent's costs and attorney fees after ethically representing a

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[6] Since MERS requires that a county review an actuarial study of the costs of its plan before adoption is permitted, it becomes apparent that even if Crawford and Kalkaska are held to have approved the B-4 plan in 2000, because they did so without actuarial studies in their possession, their actions are ineffective. Indeed, so is Otsego's, **so the B-4 plan has never been properly adopted by any County within the 46th circuit.**

client's interest.

Louya adds that "the mere fact that the attorney may doubt the possibility of success on the merits of a case, even at the outset of litigation, does not necessarily and logically lead to a conclusion that the claim is 'frivolous'," quoting the comment to MRPC 3.1 to the effect that:

> "**The filing of an action . . . for a client is not frivolous merely because the facts have not first been fully substantiated** or because the lawyer believes that the client's position ultimately will not prevail. *Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail.*" (Boldface emphasis added; italicized emphasis added by the Court).

Accord: *Pope v State Farm Mut Auto Ins Co* (Mich App No. 227893, April 9, 2002)(Attachment A per MCR 7.215(C)(1)).

To the extent either the credibility or weight of any conflicting "evidence" considered by Judge Kolenda is pertinent, Crawford and Kalkaska (and their counsel) were entitled to a trial to resolve the weight and credibility of conflicting testimony, *People v Jackson*, 390 Mich 621, 625 n. 2; 212 NW2d 918 (1973)[7]. Counsel would have acted unethically

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[7] The Supreme Court there summarized the long-standing rules on the subject:

> "The issue of credibility is to be resolved by the trier of fact. As stated in *Woodin v. Durfee*,

46 Mich. 424, 427, 9 N.W. 457, 458 (1881), 'a jury may disbelieve the most positive evidence, even when it stands uncontradicted.' Similarly, see *Crampton v. Crampton*, 205 Mich. 233, 241, 171 N.W. 457 (1919); *Cuttle v. Concordia Mutual Fire Ins. Co.*, 295 Mich. 514, 519, 295 N.W. 246 (1940); *Hughes v. John Hancock Mutual Life Insurance Co.*, 351 Mich. 302, 308, 88 N.W.2d 557 (1958); *Baumgartner v. Ham*, 374 Mich. 169, 174, 132 N.W.2d 159 (1965); *Wolfgram v. Valko*, 375 Mich. 421, 435, 134 N.W.2d 649 (1965).

"Even in a case where there is no issue of credibility and no showing of interest on the part of the witnesses, the question does not become one of law and still is to be decided by the trier of fact where the evidence relied on is contradicted 'by any testimony given in the case * * * or by any facts or circumstances in the case,' or where the evidence relied on is 'in any way improbable or discredited' or any legitimate inference may be drawn inconsistent with a finding or verdict directed as a matter of law. *Boudeman v. Arnold*, 200 Mich. 162, 164, 166 N.W. 985, 986, 8 A.L.R. 789 (1918). Similarly, see

had they abandoned their clients or refused to press the clients' case merely on the basis that the adversary, Otsego, attempted to recant the admission contained within its formal resolution of August 14, 2001 as to having had the opportunity to review the MERS January 1, 2001 Actuarial Valuation. Counsel's job is not to anticipate the trier of fact; there is nothing improper or sanctionable in making a factual allegation one can support with admissible evidence, even knowing the adverse party may adduce contrary evidence.

Even granting that Otsego may have attempted to renounce its earlier factual concession in this regard prior to suit for fraud being filed, neither Crawford nor Kalkaska (especially prior to deposing Rudi Edel and learning that he had kept his receipt of the 9 MERS' actuarials secret), still less their counsel, was under any constraint to accept Otsego's later contrary protestations, and they could hardly be held required to anticipate how a trier of fact would view those proofs had they pressed them at a trial. Factual allegations later discovered to be untrue, or, as in this case, merely assessed to be not worth pursuing, do not invalidate the reasonableness of a prior inquiry which duly produced admissible evidence supporting a party's claim or position. *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003).

Hagan v. Chicago, D. & C.G.T.J.R. Co., 86 Mich. 615, 49 N.W. 509 (1891); *Kaminski v. Grand Trunk W.R. Co.*, 347 Mich. 417, 428, 79 N.W.2d 899 (1956); *Green v. Detroit U.R.*, 210 Mich. 119, 125, 177 N.W. 263 (1920)."

The lower court seems to have erroneously conflated withdrawal of the fraud claim with a determination of its factual merits *retroactive to the complaint stage*. Crawford and Kalkaska, and their counsel, might well have retained the fraud claim, however much Otsego might now remonstrate that the factual recital in its August 14, 2001 resolution regarding the January 1, 2001 MERS Actuarial Valuation was untrue and fraudulent (as to MERS, but with prejudicial fiscal impact on Crawford and Kalkaska). A triable issue of fact exists where a party has once made a damning admission, even though it has later recanted. As the Court of Appeals once astutely observed, "No reason appears why his later recollection is to be more highly regarded than his first." *People v Gant*, 4 Mich App 671, 675; 145 NW2d 314 (1966). *A fortiori*, where a County Board of Commissioners adopts a *formal* resolution having significant financial impact both on itself and on two affiliated counties, and containing a crucial factual acknowledgement *without which the resolution will be a nullity* subsequent contrary remonstrations need not be accepted either by an adversary in litigation or by a trier of fact. *Ford v American Nat Ins Co*, 46 Mich App 368, 373; 208 NW2d 226 (1973).

For purposes of MCR 2.114 and MCL 600.2591(3)(a), a factual claim is frivolous when:

> (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party;
> (2) the party had no reasonable basis to believe that the underlying facts were true; or
> (3) the party's position was devoid of arguable legal merit.

LaRose Market, Inc v Sylvan Center, Inc, 209 Mich App 201, 210;

530 NW2d 505 (1995).

Here, no claim was ever made, and certainly there is no finding (still less any finding after a proper evidentiary hearing) that Crawford and Kalkaska's purpose (or that of their counsel) was to harass, embarrass, or injure Otsego by claiming fraud. Judge Zahra, dissenting in the Court of Appeals, found no such wrongful intent, and the majority did not trouble itself to take issue with his assessment.

Clearly, therefore, it was error to impose sanctions, because Crawford and Kalkaska (and their counsel) had a reasonable basis to believe the underlying facts were true, *i.e.*, (1) Otsego's own formal admission within its August 14, 2001 resolution, (2) combined with MERS' FOIA response which established that an actuarial study dated January 1, 2001 did indeed exist, and (3) the January 1, 2001 Actuarial Study had been provided to either the 46th Circuit Trial Court or Otsego County (with the 46th Circuit Trial Court emphatically and repeatedly denying, until Rudi Edel's March 12, 2003 deposition, four months after the complaint and cross-complaint against Otsego were filed, that it had sought any actuarial studies), all as detailed in attorney Bonnie Toskey's unchallenged affidavit.

Therefore, Judge Kolenda clearly erred in imposing sanctions, and any supposed supporting "findings of fact," being unsupported by any evidence, in the absence of evidentiary hearing, and being directly contradicted by the only record evidence, are clearly erroneous. A decision unsupported by any competent evidence, as here, is also clearly erroneous, *Zalucha v Zalucha* (Mich App No 231441, released Nov. 1, 2002) (Attachment B per MCR 7.215(C)(1)), slip op p 2), for then the lower court's view of the evidence is

not "plausible." *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1989).

Where, as here, sanctions are imposed on the premise that, "the party had no reasonable basis upon which to believe underlying facts were true," MCL 600.2591, one key question for the appellate reviewer is whether there existed a reasonable basis to believe that the facts supporting the claim were true **at the time the lawsuit was filed**:

To determine whether sanctions are appropriate under M.C.L. §§ 600.2591; M.S.A. §§ 27A.2591, it is necessary to determine whether there was a reasonable basis to believe that the facts supporting the claim were true at the time the lawsuit was filed, not more than a year later at the time of counsel's motion to withdraw. No experienced attorney or judge would dispute the fact that discovery and other circumstances during the course of litigation effect the evaluation of a case and its potential outcome if tried. ... Rule 3.1 of the Michigan Rules of Professional Conduct prohibits an attorney from instituting or defending a frivolous action. However, the comment to the rule also provides:

> **The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.** Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail.
> [Emphasis added.]

In our view, the statute at issue and the rules of

professional conduct should be read in harmony, if possible, to avoid the anomalous result of holding a lawyer personally liable for an opponent's costs and attorney fees after ethically representing a client's interest. * * * If this were permitted, an attorney, who without frivolity started a suit but became convinced that it lacked merit during the discovery process, would be induced to proceed to trial rather than forthrightly address the situation with the client in an effort to terminate the litigation.

> **We will not construe M.C.L. §§ 600.2591; M.S.A. §§ 27A.2591 in a manner that has a chilling effect on advocacy or prevents the filing of all but the most clear-cut cases. Nor will we construe the statute in a manner that prevents a party from bringing a difficult case or asserting a novel defense, or penalizes a party whose claim initially appears viable but later becomes unpersuasive. Moreover, an attorney or party should not be dissuaded from disposing of an initially sound case which becomes less meritorious as it develops because they fear the penalty of attorney fees and costs under this statute.**

Louya v William Beaumont Hosp, supra, 190 Mich App at 162-163 (emphasis added).

To like effect, the Court in *Jerico Const, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003) made clear that:

> Defendants' argument that plaintiff's claim was frivolous is based on a comparison of the facts

> as pleaded and the evidence presented at trial. However, plaintiff's inability to prove its case by a preponderance of evidence at trial does not merit a finding that its claim was frivolous. The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted. *In re Costs and Attorney Fees*, 250 Mich App 89, 94, 645 NW2d 697 (2002). **That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry.**
> *Lockhart v Lockhart*, 149 Mich App 10, 14-15, 385 NW2d 709 (1986).

The requisite "reasonable inquiry" may be determined to exist based upon either the objectively supported facts presented during discovery or trial, or based upon the attorneys' pre-trial investigation.

When the court is considering sanctions on a factual claim, "the initial focus of the district court should be on whether an objectively reasonable evidentiary basis for the claim was demonstrated in pretrial proceedings or at trial." *Calloway*, 854 F2d at 1470. If there is such a basis, an inquiry into an attorney's pre-filing investigation is unnecessary. *See id.* If there is no such basis shown, the district court must then scrutinize the objective reasonableness of the attorney's pre-filing inquiry and the basis for the claim developed by the inquiry. If the inquiry was objectively reasonable under the circumstances and disclosed a reasonable factual basis for the claim, then sanctions are not appropriate. On the other hand, if the attorney either failed to make an objectively reasonable inquiry or pursued a claim for which no basis was disclosed by such an inquiry, then sanctions are appropriate. *Id.*

Edmonds v Gilmore, 988 F Supp 948, 957 (ED Va, 1997).

In determining whether such a reasonable inquiry was duly undertaken, the focus should be on objective events and information acquired:

> The focus of such an inquiry is upon events that can be observed and verified **to some extent: what the attorney learned from his client, what efforts he undertook to corroborate the client's account**, and so on. Any determination of what constitutes a "reasonable inquiry" depends largely on the particular facts and circumstances of a given claim. In *Mohammed*, the court held that the plaintiff's **failure to conduct any investigation whatsoever** into defamation claims before bringing suit was apparent from the record, and required the court to impose sanctions under the rule.

Lloyd v Avadenka, 158 Mich App 623, 630-631; 405 NW2d 141 (1987). An attorney properly files a claim if:

> ...he has some support for his claim, but he needs discovery to prove the claim. *Frantz v United States Power Lifting Federation*, 836 F2d 1063, 1068 (CA 7, 1987). **Further, the challenged party cannot be held to what might be discovered by an exhaustive inquiry.** 11 Charles Wright & Arthur Miller, *Federal Practice and Procedure* §§ 1335 (1990). Factual errors, if any, should not result in sanctions. *Balfour Guthrie, Inc v Hunter Marine Transport,*

Inc, 118 FRD 66, 73 (MD Tenn, 1987).

Haverstick Enterprises, Inc v Financial Federal Credit, Inc, 803 F Supp 1251, 1260 (ED Mich, 1992) (emphasis added).

Similarly, an attorney is justified in relying upon objectively reasonable representations of the client. *Miller v Bittner*, 985 F2d 935 (CA 8, 1993). *A fortiori*, an attorney is justified in relying on formal admissions, constituting part of an official government resolution, made by an adversary. See MCL 600.2118a(3). Appellant law firm had more than "some support" for the fraud claim; **it had Otsego's August 14, 2001 resolution available as a damning admission of the fraud charged in the complaint, buttressed by MERS' FOIA disclosure and the plaintiff's then false denials that it had never sought let alone received *any* actuarial studies.**

It would be unreasonable to fault an attorney's "reasonable inquiry" where, as here, the attorney's investigation is stymied or impeded by inability to obtain truthful and forthcoming responses or information from opposing parties prior to the filing of suit, with its concomitant advantage of compelled discovery under oath:

> It would be particularly difficult to fault plaintiffs for a lack of prefiling inquiry when, as here, defendants have refused plaintiffs access to material information that would bear on certain allegations made in the complaint.

Morda v Klein, 865 F2d 782, 785-786 (CA 6, 1989).[8] Counsel should not have to guess at their peril which adversary is lying (and given Otsego's admission its August 14, 2001 resolution was fraudulent, it eventuates both adversaries were lying); when there is admissible and sufficient evidence to sustain a factual claim, nothing further is required, and the trial process serves to sort the wheat from the chaff. Counsel's job is more than fulfilled simply by developing admissible evidence to support a claim, whatever other information may exist or arise subsequently.

Indeed, note here that Crawford and Kalkaska and their counsel knew, from MERS' FOIA disclosure, that MERS had provided nine (9) actuarial studies, that either the 46th Circuit Trial Court, or Otsego, or both, had to be lying when they both denied possession of any such studies. Having developed admissible evidence that Otsego lied on that subject, counsel can hardly be sanctioned for pursuing the matter on behalf of their clients. *Friedman v Dozorc*, 412 Mich 1, 28-30; 312 NW2d 585 (1981).

Recently (on the very same day the Court of Appeals issued its opinion in this case), the Court of Appeals reversed sanctions where the plaintiff cited a single apposite authority in support of his position. See *George v Senate Democratic Fund* (Mich App Nos. 253202 and 254158, released May 3, 2005), slip op. pp. 4-5 (Attachment C per MCR 7.215(C)(1)). Here, *a*

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[8] To like effect see *Colburn v Upper Darby Township*, 838 F2d 663, 667 (CA 3, 1988), "One of the circumstances to be considered in determining 'reasonableness' under the circumstances is whether a plaintiff is in a position to know or acquire the relevant factual details."

fortiori, Crawford and Kalkaska (and their counsel) have not only cited a plethora of authority supporting their position, but at the time Otsego was sued for fraud, each Crawford Commissioner had advised counsel (as later reflected in their affidavits under oath) that they had been misled by Otsego's then-believed false denials of possession of actuarials, and that they had relied to their detriment (and certainly to the prejudice of the counties they have sworn to serve, Const 1963, art 11, §1) on such misinformation. Sanctions cannot survive honest appellate scrutiny in this case.

The United States Supreme Court has similarly recognized that if a party can find any legal authority to support its position, or even argue merely that controlling authority in its own jurisdiction was wrongly decided, then its pleadings cannot be held to be frivolous. *McKnight v General Motors Corp*, 511 US 659, 660; 114 S Ct 1826; 128 L Ed 2d 655 (1994).

IV. THE LOWER COURT ERRED IN THE MANNER IN WHICH IT LIQUIDATED THE AMOUNT OF SANCTIONS, DENYING THE COUNTIES AND THEIR COUNSEL A PROPER EVIDENTIARY HEARING

Standard of Review

Appellate review of the reasonableness of an award of attorney fees, when entered after evidentiary hearing, is *normally* for abuse of discretion. *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995). An abuse of discretion exists if an unprejudiced person, considering the facts upon which the trial court acted, would say there is no justification or excuse for the ruling, or if the result is so violative of fact and logic that it evidences a perversity of will

or the exercise of passion or bias. *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998); *Cleary v Turning Point*, 203 Mich App 208, 210-211; 512 NW2d 9 (1993).

However, where, as here, a trial court's award of sanctions is directly premised on its erroneous view of the law underlying the issue on which attorney fees are being awarded, review is *de novo*. *Mantei v American Fellowship Mut Ins Co*, 1999 WL 33446478 (Mich App No 205153, April 27, 1999), slip op p. 8, n. 1 (Attachment D per MCR 7.215(C)(1)).

Analysis

A. Additional Facts

In moving to liquidate the sanctions awarded, Otsego County presented a copy of its attorney fee invoices and an affidavit of its lead attorney, Christopher Johnson, attributing a substantial portion of Otsego's litigation expenses to the defense of the fraud claim.

Crawford and Kalkaska (and appellant law firm) responded with the affidavit of attorney Edward Starmer, who compared and contrasted Mr. Johnson's affidavit and invoices with Mr. Johnson's inactivity at depositions, for which numerous hours were claimed. Starmer reviewed every deposition transcript, and found a total of 17.5 pages addressed to UBAA issues (representing 34.5 minutes of elapsed time), and similarly only 19 pages (38 minutes) devoted to fraud. (Appendix 19). Starmer's methodology, rejected here by Judge Kolenda as unhelpful to Otsego, was later adopted by Judge Kolenda when, on remand, he could use it to maximize the attorney fee award to the 46th Circuit Trial Court, thus blatantly applying a double standard to the

prejudice of Crawford, Kalkaska, and their counsel.

Judge Kolenda, without holding any evidentiary hearing, relied on his own knowledge (including his claimed personal experience as a former municipal attorney of inflating his hours billed to his clients, as recompense for being paid a below-standard rate) and awarded sanctions equal to some 85% of what was requested for the fraud sanctions, and an additional amount as sanctions for the UBAA claims for a total of $122,675.77. Yet the proofs show that Otsego's counsel devoted only 72.5 minutes, or 1.2 hours, at $130 per hour, or $156, to the supposedly "frivolous" claims. Without an evidentiary hearing, the lower court had no business making findings of fact on disputed evidence, resulting in prejudice to the appellant law firm to the tune of $122,519.77, or 99.87283% of the sanctions imposed.

Note that, after Otsego was dismissed from the lawsuit, its counsel nonetheless attended trial and inserted himself into appeals to which Otsego was not a party, so there is a track record here of Otsego's counsel devoting a great deal of time to spectating. Otsego may be willing to pay counsel to indulge his curiosity, but that does not equate to such time being necessitated by any wrongful conduct of appellant law firm.

B. The Lower Court Erred In Failing To Hold An Evidentiary Hearing To Liquidate Attorney Fees Awarded As Sanctions

Before a court can award $1 of attorney fees, where issues of fact are raised, it must first hold an evidentiary proceeding to resolve questions of fact as to the proper hourly rate or the appropriate number of hours, or any similar question. *Barbier v Piku*, 460 Mich 854; 599 NW2d 100 (1999). As the Court held in *Herald Co v Tax Tribunal*, 258 Mich App

78, 92-93; 669 NW2d 862 (2003):

> The trial court did not hold a hearing to determine reasonable attorney fees and costs, but merely accepted plaintiff's rendition of total fees and costs for the entire litigation. We conclude that this was error. **It was incumbent upon the trial court, in its fact-finding role, to conduct a hearing to determine the appropriate amount of attorney fees and costs owed** * * *

Similarly, the Court ruled in *Miller v Meijer, Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996):

> **"Although a full-blown trial is not necessary, an evidentiary hearing regarding the reasonableness of the fee request is."** *Id.* at 42-43, 454 NW2d 405; *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983).

The refusal to hold an evidentiary hearing and put Otsego to its proofs was patent reversible error[9].

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[9] In *46th Circuit Trial Court v Crawford County*, 261 Mich App 477, 503; 682 NW2d 519 (2004), the Court of Appeals, in apparent violation of MCR 7.215(J)(1), held that no evidentiary hearing is required "where the parties have created a sufficient record to review the issue." The naked conclusory affidavit of the attorney who is claiming fees as sanctions, particularly when, as here, challenged as to credibility, is hardly a "sufficient record;" Crawford and Kalkaska were entitled to cross-examine Mr. Johnson and to present their own evidence

C. The Attorney Fees Awarded as Sanctions Are the Product of an Unreasonable Number of Hours Charged for Unreasonably Duplicated Legal Services

In determining a proper attorney fee award, the overriding test is the lodestar principle: the primary methodology for calculating an attorney's fee award is to determine the number of hours reasonably expended on the litigation by the prevailing party's attorney and to then multiply that number by a reasonable hourly rate, establishing a presumptively appropriate award. *Hensley v Eckerhart*, 461 US 424, 433-434; 103 S Ct 1933; 76 L Ed 2d 40 (1983); *Schellenberg v Rochester Michigan Lodge, BPOE*, 228 Mich App 20, 53; 577 NW2d 163 (1998). A court must subtract any time not "reasonably expended." *Hours that are excessive, redundant, or otherwise unnecessary must not be considered; otherwise the court would be facilitating the lawyer's violation of ethical obligations*, e.g., MRPC 1.5. *Hensley v Eckerhart, supra*, 461 US at 434, quoting *Copeland v Marshall*, 641 F2d 880, 891 (DC Cir, 1980) (*en banc*).

Also outside the scope of a proper lodestar amount are attorney fees engendered pursuing claims unrelated to those on which the party is entitled to recovery. *Hensley v Eckerhart, supra*, 461 US at 434. Mr. Johnson's credibility, not to mention the admissibility and reliability of his guesstimate as to how much of his time and fees was in defense of the fraud and declaratory relief claims, is very much at issue (note that,

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as well. An *ex parte* affidavit of an interested person is simply not conclusive, nor does it provide a reliable basis for adjudication. *SSC Associates, LP v General Retirement System of the City of Detroit*, 192 Mich App 360, 366-367; 480 NW2d 275 (1991).

despite Otsego's dismissal from the lawsuit on May 30, 2003, well prior to trial, Mr. Johnson nevertheless attended the June 17, 2003 trial prompting Judge Kolenda to question the need for his presence. After counsel for defendants dismissed Otsego, so Mr. Johnson would not have to be present for the proceedings (TR June 17, 2003 p123), Mr. Johnson replied, "Your Honor, I'd have no objection to his stipulation. I think the County would still wish that I observe the proceedings."(*Id*) Mr. Johnson also briefed issues in Court of Appeals Nos. 254179 and 254181 in which Otsego had no direct interest, so he, on behalf of Otsego, has chosen to inject Otsego into a dispute to which it is not a party, thus reflecting a failure to differentiate necessary attorney fee expenditures from voluntarily incurred fees.

A trier of fact, even faced with uncontradicted testimony to this effect, could still find Mr. Johnson not credible, or give his testimony no weight. *Boudeman v Arnold*, 200 Mich 162, 164; 166 NW 985 (1918); *Green v Detroit U R Co*, 210 Mich 119, 125; 177 NW 263 (1920). Johnson's affidavit is inadequate as a basis for summary adjudication in favor of Ostego, *SSC Associates LP v General Retirement System of the City of Detroit, supra*, 192 Mich App at 366, or other form of summary resolution of the issues of fact and law thus framed. Otsego County bore the burden of proving the reasonableness of any attorney fee claim, *Matter of Estate of Krueger*, 176 Mich App 241, 249; 438 NW2d 898 (1989), within the context of the factors identified in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), for which an evidentiary hearing was required to establish both the hours reasonably devoted to the

task and the reasonable hourly fee[10]. *Barbier v Piku, supra.*

An hourly breakdown, showing what was done and at what fee, is a prerequisite to any effort to claim that charges were reasonably incurred in conjunction with the proceedings. *Antiphon, Inc v LEP Transport, Inc,* 183 Mich App 377, 386; 454 NW2d 222 (1990); *Temple v Kelel Distrib Co, Inc,* 183 Mich App 326, 330-333; 454 NW2d 610 (1990); *Brown v Gillette Co,* 536 F Supp 113, 119-120 (D. Mass, 1982); *Furtado v Bishop,* 635 F2d 915, 920 (CA 1, 1980).

Further, the number of hours invested must be scrutinized. As the Court said in *Brown v Gillette Co, supra,* 536 F Supp at 320-321:

On the other hand, when a defendant is asked to pay plaintiff's fees, no client relationship exists and the defendant has no control over the fee request. Furthermore, because "billing judgment" is an important component in setting the fees charged clients, it is equally important when a court is expected to set a fee amount. *Copeland* [*v Marshall,* 641 F2d 880 (CA DC, 1980)(en banc)], *supra,* at 891. "Hours that are not properly billed to one's client are also not properly billed to one's *adversary* . . .." *Id.* See also *Furtado v Bishop, supra* at 923-

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[10] Note that, in contrast to the applications from Court of Appeals Nos. 254179 and 254181, where the reasonableness of the hourly fees charged by counsel for the 46th Circuit Trial Court are very much at issue, Otsego County's counsel charges a rate commensurate with what appellant law firm concedes is reasonable, so there is no dispute as to hourly rates for Otsego's counsel. There is a dispute as to the number of hours properly attributable to (allegedly) sanctionable misconduct.

24 n. 16 ("We would have preferred a convincing demonstration of 'billing judgment' illustrating that plaintiffs themselves initially had separated the 'hard' hours from the 'soft'["]). Therefore, the exercise of billing judgment becomes the court's responsibility.

The court is charged with carefully scrutinizing an attorney's time records to avoid excessive fees. *King v Greenblatt*, 560 F2d 1024, 1027 (CA 1, 1977), *cert den* . . .. **Not only must attorneys provide a full and specific accounting of their time, but "bills which simply list a certain number of hours and lack such important specifics as dates and the nature of the work performed during the hour or hours in question should be refused."** *Id.* **Similarly, time "beyond that consistent with a standard of reasonable efficiency and productivity should be eliminated."** *Furtado v Bishop, supra,* at 920. **Time records should be reviewed to avoid duplication of effort**. See *Furtado v Bishop, supra* (reduction of hours spent preparing an appellate brief by one-half to avoid "possible duplication of effort and diseconomies of committee authorship that may occur in a case where there is no demonstration to the contrary.") See also . . . *Suzuki v Yuen*, 507 F Supp 819 (D Hawaii 1981) (reduction of hours by two-thirds for "unreasonably high" number of hours spent on brief preparation and judgment of court that work could have been done by lower paid associates and/or law clerks).

Beyond generally considering accuracy in record keeping and efficiency in performance, **the court must evaluate different types of work performed by the attorneys**, distinguishing between:

> Legal work, in the strict sense, and investigation, clerical work, compilation of

> facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. *King v Greenblatt, supra* at 1027. (citation omitted).
>
> While such an evaluation ideally proceeds on the basis of a detailed analysis of each item of recorded time, such is usually not practicable, or even possible, and an across-the-board reduction of hours claimed has to suffice.
>
> . . .

(Emphasis added.) *Accord: In re Irwin Estate*, 162 Mich App 522, 530-531; 413 NW2d 37 (1987).

Accordingly, Otsego County's inflated attorney fee bills, grounded as they are on wholly amorphous and inadequate time records, fail to provide a proper basis to support any fee award. At the very least, the vast bulk of the fees claimed must be rejected as duplicative, inefficient, and unreasonable.

D. The Circuit Court Erred In Holding Crawford, Kalkaska, And Their Attorneys Liable For More Than An Aliquot Portion Of The Attorney Fees Attributable To Sanctionable Misconduct

Assuming sanctions were properly assessed, the circuit court was obligated to ascertain the portion of Otsego's attorney fees actually attributable to defense of the fraud and (ostensible) UBAA claims. The circuit court's failure to conduct an evidentiary hearing to explore the precise parameters of that fee question improperly exposed Crawford, Kalkaska, and their attorneys to liability for more than the

aliquot portion of fees caused by sanctionable misconduct. *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 522 -524; 664 NW2d 263 (2003) (case evaluation sanctions limited to those expended in defending only the legal theories and individual damages claim of single plaintiff who rejected case evaluation).

RELIEF REQUESTED

Appellant law firm respectfully requests that:

1. The Court reverse summary disposition of the UBAA claims, which *ipso jure* will require reversal of sanctions based on "frivolous" pleading without proper standing;

2. Additionally, the Court should reverse the decision to impose sanctions for either fraud or declaratory relief in relation to the UBAA because counsel had a good faith factual basis for pleading the fraud claim on behalf of its clients, although subsequently discovered evidence led to the voluntary dismissal of that claim, and counsel also had a good faith basis in fact and law for asserting a claim for declaratory relief in relation to the UBAA, even if those claims were properly summarily dismissed;

3. Alternatively, the lower court's determination of the amount of sanctions, reached without conducting an evidentiary hearing on disputed facts, and without according appellant law firm an opportunity to test by cross-examination the credibility and accuracy of the amount of fees predicated exclusively on the affidavit of Christopher Johnson (duly challenged by the affidavit of Edward Starmer), should be reversed.

Respectfully submitted,

_____/s/_____ Date:_____

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The Fourteenth Amendment to the Constitution, Section 1

(Emphasis added)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall** make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State **deprive any person of** life, **liberty**, or property, **without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE OF MICHIGAN COURT OF APPEALS

46TH CIRCUIT TRIAL COURT

Plaintiff-Appellee,

-v- Docket Nos. 254179; 254180; 254181; 254182; 256129; 257234

CRAWFORD COUNTY, et al,

Defendants-Appellants

_____/

ORAL ARGUMENT [EXCERPTS]

DATE: TUESDAY, FEBRUARY 15, 2005
LOCATION: GRAND RAPIDS, MICHIGAN

COURT OF APPEALS PANEL:

HONORABLE BRIAN K. ZAHRA, Presiding;
HONORABLE JANET T. NEFF;
HONORABLE JESSICA R. COOPER

APPEARANCES:

COHL, STOKER, TOSKEY & McGLINCHEY, P.C.
601 N. Capitol Avenue
Lansing, Michigan 48933
By: **ALLAN S. FALK, (P13278) BONNIE G. TOSKEY, (P30601) EDWARD J. STARMER, (64842)**

On behalf of CRAWFORD/KALKASKA COS.

KIENBAUM, OPERWALL, HARDY & PELTON, P.C. 325
South Old Woodward Avenue
Birmingham, Michigan 48009
By: THOMAS **G. KIENBAUM, (P15945)**
On behalf of 46TH CIRCUIT COURT.
APPEARANCES, CONTINUING:
JOHNSON, ROSATI, LABARGE, ASELTYNE & FIELD, P.C.
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Farmington Hills, Michigan 48331
By: **CHRISTOPHER J. JOHNSON, (P32937)**
On behalf of OTSEGO COUNTY.

METROPOLITAN REPORTING, INC.
(517) 886-4068

ORAL ARGUMENT ON BEHALF OF CRAWFORD/KALKASKA COUNTIES

MR. FALK: May it please the Court, Allan Falk appearing for Crawford andKalkaska Counties and on behalf of the law firm of Cohl, Stoker, Toskey & McGlinchey,P.C. With me also representing the counties are attorneys Bonnie Toskey, who was lead counsel at trial and will answer any particular questions that might pertain to the facts. She knows them first hand; and Edward Starmer. I would ask Mr. Starmer be allowed to approach the bench to distribute unpublished opinions I'll be citing.

* * *

MR. FALK: No, I'm sorry, that's a complete red herring, your Honor. You'll recall the holding in the Judicial Attorneys Association case, the counties cannot negotiate with the employees. If there's any bargaining done, and these

employees are not unionized, but there's some bargaining done --

JUDGE NEFF: So the concessions that the judge obtained from the employees, the Court employees, you're saying has no effect whatsoever on the Board of Commissioners, even though they get a --

MR. FALK: That's correct.

JUDGE NEFF: -- a financial, the physical benefit of those concessions doesn't matter?

MR. FALK: No, that's what this Court held in the Ottawa County case. You know the court bargains with its employees, that was a unionized Court, this is not, they bargained when their case came to the collective bargaining agreement, they came to the County Commissioners, and said, here's our collective bargaining agreement, please fund it. And they said no, and this Court said you don't have to. You can only --

JUDGE NEFF: In this case the county said yes.

MR. FALK: No, they said no.

JUDGE NEFF: They passed resolutions.

MR. FALK: They passed resolutions giving certain representations about the cost, and when they found out the representations were false, they rescinded their resolution.

JUDGE NEFF: They knew the representations were inaccurate.

MR. FALK: No, they didn't, that was the point. They suspected they were inaccurate, and they kept saying, you negotiate in terms of the cost of the pension plan, give us actuarials, and they were told repeatedly by both Otsego County and the Court, we don't have any actuarials. Later they found out that the Court Administrator or somebody at the Court had nine actuarials. They found this out by a Freedom of Information Act request to the Michigan Employee Retirement System, there were nine actuarials.

They then say they weren't exactly the same exact pension plan down to the last jot and tittle. They had nine actuarials, and they kept saying they had none.

Otsego County passed a resolution saying we acknowledge having in hand a study that tells us -- an actuarial study and says, these figures you're giving us, they don't seem right to me. We can't get anything for this price that's similar, and we have similar plans. How can you give us these numbers? The Court Administrator says, I assure you these are correct numbers, and on the basis of that assurance, Crawford County says, okay, you've assured us that your numbers are correct. Well if they are given that assurance and on the assumption they're correct, we will approve your retiree health care plan.

But immediately the court comes back --

JUDGE COOPER: What is your assurance, even knowing those were not correct numbers?

MR. FALK: They didn't know they weren't correct, they suspected they're not correct. There's a huge difference between knowing and suspecting. We cite a lot of federal case law and a lot of state case law on that point.

JUDGE COOPER: You have reason to believe that these were not correct numbers, and then you insisted that this -- that you would do this only on the basis that the numbers that were presented were correct?

MR. FALK: Yes. That's what Crawford County's resolution said.

JUDGE COOPER: You had knowledge, and Judge Davis did not have the knowledge at that moment, you went ahead and made this agreement?

MR. FALK: Wait a minute. Judge Davis did not come to the meeting. It was Mr. Edel, the Court Administrator that made these recommendations that turned out to be false, he knew were false when he made them because he already

sent a memo to Judge Davis saying, you know, these numbers I'm giving these other guys aren't true, there's a whole different set of numbers.

JUDGE COOPER: You knew the numbers were not true. You had been --

MR. FALK: No, they did not.

JUDGE COOPER: You had good reason to believe that those numbers were not correct at the time that you made this agreement?

MR. FALK: Well, it's not an agreement if you tell me that you're going to sell me widgets for a dollar, and I say gee, I don't know I don't think you can manufacture widgets for a dollar.

JUDGE COOPER: It's not an agreement if you vote on it?

MR. FALK: No. Agreement requires two parties, okay? So if you tell me you're going to sell me widgets for a dollar, I don't think you can even produce them for a dollar, and

you say, yes I can, I can for 75 cents, I'll be happy to charge you a dollar, I say fine, I'll buy them at dollar; and you come back and say, you've agreed to buy the widget for the price of two dollars --

JUDGE COOPER: Why did you vote on it if you thought the number was in error?

MR. FALK: Because this thing had been simmering for a long time.

JUDGE COOPER: You agreed to it even though you knew it was in error?

MR. FALK: The Court had been pressing and pressing. They agreed to it on the terms presented, saying look, you know, if you're not lying to us, if you're telling us the truth, then we agree, and then immediately Judge Davis comes back and says these numbers aren't true.

JUDGE COOPER: So every agreement has to -- you have to go behind and verify all of these numbers, any vote that's taken by the Commissioners?

MR. FALK: No, but that's what fraud is all about, if I -- if we make an agreement--

JUDGE COOPER: How can you have fraud, if you knowledge?

MR. FALK: If you make certain recommendations

-JUDGE COOPER: How can you have fraud –

MR. FALK: Because there's a difference between suspicions and knowledge. We have suspicion, not knowledge.

JUDGE ZAHRA: Let me say you started off by saying this is an inherent power case.

MR. FALK: I said supposedly, I don't think it is.

JUDGE ZAHRA: And you started to explain why there's not an inherent power claim, because it's not necessary and

reasonable, and it doesn't effect serviceability. I'm trying to categorize the whole thing. Isn't this also a breach of contract claim? Because if they can establish a contract, it doesn't matter whether it's necessary, or reasonable, or affects the serviceability.

MR. FALK: Right.

JUDGE ZAHRA: Okay. Now in the Court's findings about in concluding there **was** a contract, it referenced the resolution and the funding. All right? There's a portion of the resolution that clearly ties the health care and the retirement benefits to the recommendations that existed that were incorrect. But it also then funded, part of the resolution funded, we will give this much money. Is that enough?

MR. FALK: To do what, to make a contract?

JUDGE ZAHRA: To enter into the contract.

MR. FALK: First of all, I don't think there ever can be a contract here, because there is a pre-existing legal duty by

the county to fund the judicial operation. We've got lots of case law on that. It comes from medical malpractice, governmental immunity type cases, where someone says, I know this hospital has governmental immunity, but they were charging me for the medical care they gave me, and therefore I have a contract, and therefore I can sue them for malpractice, and we can keep saying no because they had a pre-existing duty under the statute to provide medical service for anyone who shows up, even though they can charge people who can afford it.

JUDGE ZAHRA: So then you disagree with my opening remarks, that is that they can win if they can either convince us of an inherent power claim or

contract claim?

MR. FALK: I agree they could win a --

(inaudible).

JUDGE ZAHRA: But you're saying there's no possibility that it's a matter of law, if I understand? MR. FALK: Right.

JUDGE ZAHRA: So there's a duty there to fund the Court but not a duty to fund the Court the way the Court wants to be funded, so why can't that be a contract claim? Why can't you agree or negotiate and give the Court something that would be a binding contract?

MR. FALK: What's it giving us in exchange then, what's its consideration? Its consideration is we're going to do our job, okay, well --

JUDGE NEFF: The concession of the employees.

MR. FALK: But those concessions are not concessions to the county.

JUDGE NEFF: But money is saved by the county.

MR. FALK: It doesn't matter.

JUDGE NEFF: Right?

MR. FALK: Doesn't matter.

JUDGE NEFF: What you're saying is there could never be a contract.

MR. FALK: I'm saying that. And I'm also saying that even if there is a contract --

JUDGE NEFF: Then why the resolution? What's the point?

MR. FALK: You have to appropriate money somehow. You have to let your treasurer know when to pay money out of the County Treasury, they have to have an appropriation when to do it. This was an additional appropriation they were requesting, beyond what -- I mean they submitted a line item budget. It had all been approved.

JUDGE NEFF: Why negotiate then, Mr. Falk? Why negotiate if the County is taking the position that we can pay you whatever you -- whatever we want, and we are appropriating, if you can't?

MR. FALK: If it's sufficient for the operation.

JUDGE NEFF: We are appropriating X number of dollars, why would they negotiate in the first place? What was the point of all that, of that protracted negotiation that went on?

MR. FALK: Because you're all living in the same county. I mean you're trying get along with people. We're saying we want something, we don't think we can afford that, let's figure out how we can get you most of what you want, how we can figure out how to pay for it. Of course you discuss that sort of thing. Every county, every funding agency -- when the Court of Appeals presents its budget to the legislature there's a lot of schmoozing going on. I think you guys probably have a lobbyist, if not the chief judge acting as a lobbyist, who goes around and says, you know, we really would like extra money for security, and they say, well but how much is it going to cost, we can't afford that, maybe we can give you some lesser, you know, security system that

will do the job almost as well, that's something we can afford. But you're not going to call that a contract with the state legislature. They can't make a contract about paying money out of the Treasury.

JUDGE NEFF: If they pay, a law says we're going to give the Court of Appeals ABC security agreement, and then they don't fund it, then what? Or they later say well --

MR. FALK: You mean, what, they repeal the law?

JUDGE NEFF: -- we really don't want to do it?

MR. FALK: Well, for starters it's not a contract because, and this is true at the county level, I'm sure it's true at the state level as well, every time there's an election there's a new county board, even though it might be the same people holding over from one time to another, and we found that out, in the Attorney Generaly v Riley case, when outgoing Governor Milliken attempted to appoint Dorothy Riley to the Supreme Court, and incoming Governor Blanchard --

JUDGE NEFF: Let's not digress.

MR. FALK: That's the same kind of issue. We know, and we've cited lots of case law that says when you contract with a public agency that is -- that changes every so often, your contract never extends beyond the life the current agency.

JUDGE NEFF: We know, don't we, Mr. Falk, that county funding and contracting responsibilities often extend in the future. How would you ever build a building, how would you ever -- we just built a brand new courthouse, how would one county board ever get that accomplished in the two years that that particular county board --

MR. FALK: They can't, I think the next county board can call it off and say, hey, we don't need that building any more, and they have to pay for everything that's been done up to that point and that's the end of the contract. And -- the most recent unpublished cases in this court specifically say that.

JUDGE NEFF: And they wouldn't be liable for breach of contract?

MR. FALK: I don't think so.

JUDGE NEFF: Oh, man.

MR. FALK: Because the case law says when you contract with a public agency you are on notice that a new agency may take over, and unless there's a statute that allows you to make a contract for longer than the term of that board and you know we've cited the statutes in this case, there are statutes that allow counties to make long-term contracts, and they specifically cover buildings. There's no statute that covers this or that would allow this contract to go forward.

JUDGE ZAHRA: For purpose of advancing the argument, let's assume that the contract can be made, just for purposes. It seems the trial court found both a contract and an inherent -

MR. FALK: It found a contract on summary disposition without giving us any of our defense, giving us a chance to make any of our defenses, because it threw out the fraud claims, which we think were, minimally, there was an issue of fact. We have - - every Commissioner filled out an Affidavit, and it was submitted to the Court saying, you know, they lied to us, they gave us false information, and anything we did was based on that false information, so we had fraudulent inducement. And their answer to that was to cite this privileged memorandum from the Crawford County Controller that they should never have possessed, but ignore that for a minute, to cite this memorandum --

JUDGE NEFF: There is –

JUDGE COOPER: Let's not ignore the fact that they possess something that they – that they shouldn't have. You knew they possessed this, and you didn't -you sat on it and didn't do anything about it.

MR. FALK: Not so. The first time we found out they had it, we objected and they agreed, for the purpose of allowing a deposition to go forward is very standard, to say, look we object to your bringing this up. We think it's privileged. They say, it's not privileged. This is something the judge ordered, but your objection is preserved. Now they're going to turn around and pull the rug out from under us and say, oh, well your objection isn't preserved, after we agreed on the record it was. It was on the basis of that agreement we allowed the deposition to go forward.

JUDGE ZAHRA: Right, but then a substantial period of time passes where the very same issue comes before the Court and --

MR. FALK: And isn't the burden on them having processing this to validate their using this?

JUDGE COOPER: Isn't the burden upon you to object to it?

MR. FALK: We've already objected. Now doesn't the burden --

JUDGE NEFF: You objected in the deposition.

MR. FALK: Yes.

JUDGE NEFF: But you never told the judge.

MR. FALK: Don't they have an obligation to tell the judge?

JUDGE NEFF: No, they don't, Mr. Falk, that's your job. Any lawyer who has taken a deposition and puts an objection on the record has the obligation, if they want to pursue the issue, to bring it before the trial judge for a ruling.

MR. FALK: Granting that, let's just assume that's true, okay? When it comes to attorney/client privilege, only the client can waive the privilege.

JUDGE NEFF: So you can wait seven months to bring this up?

MR. FALK: Why not? That's why I said, let's just ignore that for the moment.

JUDGE NEFF: Why not? Because the issue has already been closed seven months later.

MR. FALK: The case is not final. MCR 2.604 says the judge --

JUDGE NEFF: You had clients who admitted the truth of the letter essentially that said, yeah, that's why we passed the resolution, to put pressure on the --

MR. FALK: We had our doubts, but we were relying on their -- what could make it more clear that you're relying on their numbers than a resolution that says based on your numbers we'll give you the money that your numbers call for? I don't know what possibly you could do other than just say, well, we wouldn't approve this at all. When this has been hanging around for

months and months, the Court keeps coming back and -

JUDGE COOPER: Why just not approve it all? You mentioned that statement --

MR. FALK: If I would have been there, I wouldn't have approved this, but they did because they're trying to be nice folks who were trying to get along with their judicial officers.

JUDGE NEFF: They were trying to put pressure on the Court, they were playing a game, and they got burned.

MR. FALK: No.

JUDGE NEFF: I mean it's as simple as that.

MR. FALK: So you mean the Court can take advantage of its fraud because they let their guard down at some point and trusted them?

JUDGE COOPER: The Court put forth the fraud, is that what you're saying?

MR. FALK: The Court Administrator gave them false numbers and that's what led them to pass the resolution. So -

- I mean, one of the unpublished cases we're handing out today is, EJS Enterprise, you and Judge Zahra were on that panel, and you said, you know, when you make an offer there has to be an acceptance that's exactly in the terms of what's offered. So if Crawford's resolution is an offer saying, on these terms we will approve your health care plan, the Court immediately came back and said those aren't our terms. Well then there's no offer, no acceptance, no contract. I mean, that's pretty basic stuff. So if the law is going to change on that between the EJS case and this case, I can't explain it to myself or to my clients why that would be.

So I don't see how there can be a contract. Or at least how we don't get to have a trial with issues of fact on that. Now Mr. Compo's memo says a couple of things. One, it says what his impression is of what the commissioners were thinking. Well if they can qualify him as a mind reader expert, they can call him as a witness and we can dispute

that testimony and the trier of fact can pass on its weight and credibility, okay?

The second thing he says is what he thinks he knew, and the judge says, well he is an agent, and therefore you guys know that. Well, that is clearly wrong, because he's not an agent who negotiated this transaction or who approved this transaction. It was done directly with the Board of Commissioners.

So if knowledge of some agent somewhere always precludes the principal from claiming fraud, then when the U.S. government makes a contract and it turns out that some private in a fox hole in Iraq might have known there was some fraud involved, the Government can't get out of the contract? I don't think that's the law. That would be a pretty strange law. So all that law says, when knowledge of the agent is knowledge of the principal, it applies to transactions that are handled by the agent.

JUDGE ZAHRA: I agree, but isn't there some middle road there? I understand the concept of principal and agent, the agent must be working with the principal, that's clearly something that applies, but then it gives the example of, you know, the person who arguably is an agent who is out of the picture, but here you've got the controller who is, I assume, always involved in the financial affairs of the County, that knows what's going on, and as you've indicated, this negotiation was going on for a while, so isn't there some middle ground here where we can assume that this county agent or this county representative who works with this commission on a regular basis, that that person's knowledge is imputed to the Board of Commissioners?

MR. FALK: Well in this case, Mr. Compo was asked, you know, why couldn't you check with Mr. Edel and see if the figures are really right. He does that immediately before this meeting where he passed the resolution. Edel says, my

figures are right, I assure you they're right. He reports that back to his principal, Mr. Edel assures me these are the correct figures. On that basis they passed the resolution. Now they're saying that Compo somehow knew we were lying. I'm not sure Compo really knew that. He suspected, because he knew they couldn't get the same. They were buying similar insurance and paying more money for it, so he didn't know how this guy could get the lower price. There's dozens of insurance agents and companies out there, different groups.

JUDGE ZAHRA: He certainly doesn't say I suspect it very strongly.

MR. FALK: Well, I understand, but that's still not binding for summary disposition, right, the fact is supposed to be reviewed in the light most favorable to my client not most favorable to them. There's an issue of fact and we're entitled to call other witnesses and say we didn't know that,

and we're the ones who made a decision we didn't know that.

JUDGE NEFF: Well, your clients seemed to admit they didn't.

MR. FALK: Well, they all filed Affidavits saying they didn't.

JUDGE ZAHRA: I'm going to let you do whatever you please. You got six minutes left. We're going to hear from the other side. I don't know how much you want to reserve for rebuttal.

MR. FALK: I'll take that time for rebuttal. I didn't really get to discuss any of these cases. Quickly I would like to mention the Judge Duggan opinion that is in your stack there. He says a number of things about attorney fees, which are very important here. First of all, sanctioning the Plaintiff's attorneys for what they did in this case is just ludicrous. I mean, their job is to be advocates for their

clients, not bowing and scraping to the other side just because they happen to have a court that is a Plaintiff.

In that case, he's talking about attorney fees, he says, number one, when you come from out of town to a court, and you then ask for attorney fees, you get it based on the prevailing local rate. We know the local rate on this case is 130 dollars an hour. That's what the Cohl and Johnson firms charge, not a question. Second, that when you have a case that's partly based on things for which you can get attorney fees and partly not, and in this case we know the American Rule applies, contract claims are covered by the American Rule. Haliw versus City of Sterling Heights, 471 Michigan 700, the American Rule was reaffirmed. So they can't get any attorney fees for their contract claims because those are outside the American Rule. If they're I – I mean, they're within the American Rule in inherent powers claim, if you can get attorney fees in an inherent power claims, it doesn't

apply to contract claims. We don't think you can get them for inherent powers claims, because Hillsdale said you couldn't. Hillsdale said you can only get them under the statute. And this court previously held the statute doesn't cover that.

A couple other important quotes from Judge Duggan, I call your attention to pages 13, 30, and 34, where we've highlighted the relevant part, and I'll save the rest for rebuttal. Thank you.

[ARGUMENT OF MR. KIENBAUM AND MR. JOHNSON OMITTED AS IRRELEVANT TO PETITION FOR CERTIORARI]

REBUTTAL ARGUMENT ON BEHALF OF CRAWFORD/KALKASKA COUNTIES

MR. FALK: Thank you, your Honor.

JUDGE ZAHRA: Mr. Johnson, is this yours?

MR. FALK: If as Mr. Kienbaum says, the retiree health care is costing less than everybody expected, and it really doesn't matter therefore it's all a tempest in a tea pot, then why was it that Judge Kolada refused to accept the conditions that the Crawford Board put on it? It must have mattered to somebody. Apparently it mattered to Judge Davis, he brought the lawsuit on that basis, and he's the one that knew what he was paying for it.

JUDGE ZAHRA: I thought about that, but was it really he refused to accept, or was it, look I'm bringing to your attention the figures?

MR. FALK: No, no, because his version of the so-called contract had a provision that said at some point if this fund becomes insolvent, the counties wanted to say, well, you know, if health care goes up as we all, you know, see everyday in the newspaper, at some point we're going to bail out. You know, we wouldn't be able to afford it. Here's what

we think we can afford. He said, no, you can't have that, if the fund goes insolvent, you will agree to figure out some way to pay the extra money.

JUDGE COOPER: Judge Davis had a fail safe provision, he said that there would be no unfunded liability, and there is no unfunded liability.

MR. FALK: No, he said there would be no unfunded liability because the Counties would agree to fund any unfunded liability, because the County couldn't bail out of the contract.

JUDGE COOPER: Where he had a fail safe provision, there would be.

MR. FALK: The fail safe provision was the County would provide more money, that was the fail safe provision. It was based on the Counties providing more money. The notion that the minimum funds needed for a court to operate changes if at some point the Court has

told its employees, oh, we can give you, you know, double pensions, I find that quite striking. I don't think the Constitution is quite that pliable. I think the constitutional standard is very restrictive, it says, look, you know, you got to come to us and say, we need a place for the jurors to meet and we don't have any room that's private, you've got to give us a private room for the jurors, you've got to build us a wall and make it soundproof, certainly we've got to do that. But if you promised us a hotel for the jurors, you know, run by the Radisson Corporation, with a six-star rating and five-star chef, and then you find out you can't afford that, certainly you can't afford it.

I mean, the rule always is, you've got to live within your appropriations. There's nothing that the chief judge --

JUDGE ZAHRA: And all right, you know the facts, I'm going to suspect, slightly better than me at this point, but didn't Judge Kolenda merely enforce the funding of the 50

thousand or the percentage of the 50 thousand as opposed to an unlimited liability? It's simply the amount that's in -- that's stated in the resolution, the first portion of the resolution?

MR. FALK: Right, it said -- nobody understood -because everybody understood for the first few years, first of all they apparently did get a cheaper premium if what Mr. Kienbaum says is true, they must have gotten a cheaper premium than Rudy Edel actually was projecting. I don't know about that.

But it's a limited appropriation, it's not that we're going to provide you health care, it's just that this is the money you have, X dollars, and if the money should run short, you guys have to appropriate more money. That's part of the contract that he's enforcing, but so far it hasn't run short apparently. Now these interesting charts are here. He says there's no unfunded liability. Yeah, there are, because the pension went

from B-2 for most employees, a few B-3, went to B-4 retroactively that created an immediate liability of 1.4 million dollars for counties that can't afford that. These are counties that aren't running sheriff patrols at night because they can't afford to, and they have to close their county offices at three in the afternoon, because they can't keep them open all day for the citizens in their county, and suddenly they've got this huge unfunded liability.

JUDGE COOPER: And where do you see that huge unfunded liability in the record?

MR. FALK: It's inherent in the retroactive pension plan, it's in there.

JUDGE COOPER: Where do you get one point three million?

MR. FALK: That's where it comes from. MERS comes up with these figures, we don't invent this. MERS will adopt a pension plan that says here's what it's going to cost.

JUDGE COOPER: Where in the record?

MR. FALK: It's a voluminous record. Do you want Miss Toskey to answer that?

JUDGE COOPER: No, I want to you to answer that.

MR. FALK: I don't know. I just know it's in there, because all the evidence about MERS was in there. We were told it was going to cost 8 percent of payroll and it cost 16 percent of payroll, double.

That's in the record. I mean I don't know what more in the record you would want for that, but all the stuff of MERS was in the record.

When inter-governmental agreements were permitted, there's specific statutes that allow those. There's no statute providing for an agreement or contract between a county and its local court over basic funding issues. And the counties are limited, they have limited powers, you know.

So if there's some statutes that say you can make these kind of contracts, you can make these kind of long term contracts, then if there's no statute that authorizes this contract, it must be outside their powers. They have no implied powers, only specifically granted powers.

In terms of attorney fees, one of the things about inherent powers is you get the minimum necessary. So that's why we've been consistently arguing that you must exhaust other available resources, which these folks absolutely didn't even consider doing. They had Otsego County, Mr. Johnson you've seen him here, he's a perfectly competent fellow and Otsego County has been on the 46th Circuit Court side since this thing started, they could have used him at 130 dollars an hour.

This court's prior opinion said there are lots of attorneys in Crawford County, Kalkaska County, Otsego County that would be happy to take this case, perhaps on a pro bono

basis. When the court needed counsel to charge a lawyer with contempt for lying to them during oral argument, In Re Thurston, 226 Mich App, Joel Boyden, the former state bar president from Grand Rapids, one of Grand Rapids', you know, great lawyers, took the case *pro bono*. That's possible. So until you've exhausted available resources, you don't have a necessity to hire out-of-town counsel at double or triple the going rate.

JUDGE ZAHRA: One minute.

MR. FALK: I would point out that Friedman versus Dozorc, 412 Michigan, page 27 says that counsel in a case are advocates for their clients, and they don't really owe a duty to the other side. They're trying to say that when the Cohl, Stoker firm gets information, they've got a bunch of commissioners coming and saying we didn't know what the real figures were, we suspected they were false, we really didn't know. They form a pleading on that basis. It's an issue

for the trier of fact. What did they know, when did they know it, did they really know it, didn't they know it. Their job is to advocate for their clients, not act as a screening jury and say, well, gee you know, we might lose this case at trial and therefore we can't bring it without fear of being sanctioned. That's not the way the thing is supposed to work. They're supposed to press their client's case. And even if they think they're going to lose, they're entitled to press their case. We've cited case law on that.

This is a very important case really for the future of republican government in Michigan. And the question is, is the legislative branch going to be allowed to retain the power of the purse, or are we going to have a situation where the judiciary can demand additional cream puff benefits and force somebody to pay for them? And I hope that wouldn't be the case. Thank you.

JUDGE ZAHRA: The case is submitted.

28 U.S.C. §§1443(1) and 28 U.S.C. §1446(b)

28 U.S.C. §§1443(1) Civil rights

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

28 U.S.C. §§1446(b) Procedure for removal

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

Order

Entered: May 31, 1996

Michigan Supreme Court
Lansing, Michigan
James H. Brickley,
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

Administrative Order 1996-9

AUTHORIZATION OF DEMONSTRATION PROJECTS TO STUDY COURT CONSOLIDATION

_____/

In its report entitled "JUSTICE IN MICHIGAN: A Program for Reforming the Judicial Branch of Government; a Report to the People of Michigan from the Justices of the Michigan Supreme Court," the Supreme Court stated its intention to authorize demonstration projects to study and evaluate the merger of the circuit, probate and district courts into a fully consolidated trial court.

CRAWFORD, KALKASKA AND OTSEGO COUNTIES
46th Circuit Court (Crawford, Kalkaska and Otsego)
83rd District Court
Crawford County Probate Court
Kalkaska County Probate
Otsego County Probate

During the two-year term of the demonstration project, these courts shall be referred to as the 46th Circuit

Trial Court.

The Hon. Alton T. Davis is appointed as the Chief Judge of the 46th Circuit Trial Court. He shall have all the authorities and responsibilities of a chief judge under MCR 8.110 as to all of the participating courts.

The judges, magistrates and referees within the 46th Circuit Trial Court **are** assigned to serve the whole court. Subject to the direction of the chief judge and the limits on the authority of a non-lawyer probate judge, each judge may **exercise** the jurisdiction of a judge of the circuit, probate, and district court. Subject to the direction of the chief judge, each magistrate or referee may perform the functions of a domestic relations referee, a district court magistrate or a juvenile court referee, with the authority to conduct proceedings as allowed by law and court rule.

The 46th Circuit Trial Court may form divisions. These divisions may correspond to the existing workload of the circuit, probate and district courts, or may reflect another partition of the workload of the court; provided that the 46th Circuit Trial Court will incorporate into one general division issues affecting the family.

During this demonstration project, the 46th Circuit Trial Court may enter into cooperative agreements with state and local non-judicial branch agencies to test the feasibility of the court to carry out essential court functions, such as record-keeping, felony probation services, information systems management, personnel management and financial management.

The chief judge of the trial court shall cooperate with

the State Court Administrative Office by abiding by the terms of the project agreement, which includes reporting and evaluation requirements.

Specific administrative and procedural requirements for each project, as needed, will be implemented through local administrative order or local court rule pursuant to 8.112.

The State Court Administrative Office shall submit a status report to the Supreme Court at the end of each year of the demonstration project.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 31, 1996 /s/ Corbin A. Davis
Clerk

Mich. Comp. L. §§600.8148 and 600.8152

Mich. Comp. L. §600.8148 Eighty-third district

The eighty-third district consists of the counties of Roscommon and Crawford, is a district of the first class, and has 1 judge. Beginning April 1, 2003, the eighty-third district consists of the county of Roscommon, is a district of the first class, and has 1 judge.

Mich. Comp. L. §600.8152 Eighty-seventh district

The eighty-seventh district consists of the counties of Kalkaska and Otsego, is a district of the first class, and has 1 judge. Effective April 1, 2003, the eighty-seventh district consists of the counties of Crawford, Kalkaska, and Otsego, is a district of the first class, and has 1 judge.

Mich Ct Rules 2.114(E) & 2.116(C)(5) & (D)(2) **APPENDIX V**

Rule 2.114 Signatures of Attorneys and Parties; Verification; Effect; Sanctions

(E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

Rule 2.116 Summary Disposition

(C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:

* * *

(5) The party asserting the claim lacks the legal capacity to sue.

* * *

(D) Time to Raise Defenses and Objections. The grounds listed in subrule (C) must be raised as follows:

* * *

(2) The grounds listed in subrule (C)(5), (6), and (7) must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading. Amendment of a responsive pleading is governed by MCR 2.118.

The Michigan Uniform Budgeting and Accounting Act (excerpts)

MCL 141.436:

Sec. 16. (1) Unless another method for adopting a budget is provided by a charter provision in effect on April 1, 1980, the legislative body of each local unit shall pass a general appropriations act for all funds except trust or agency, internal service, enterprise, debt service or capital project funds for which the legislative body may pass a special appropriation act.

(2) The general appropriations act shall set forth the total number of mills of ad valorem property taxes to be levied and the purposes for which that millage is to be levied. The amendatory act that added this subsection shall be known and may be cited as "the truth in budgeting act".

(3) The general appropriations act shall set forth the amounts appropriated by the legislative body to defray the expenditures and meet the liabilities of the local unit for the ensuing fiscal year, and shall set forth a statement of estimated revenues, by source, in each fund for the ensuing fiscal year.

(4) The general appropriations act shall be consistent with uniform charts of accounts prescribed by the state treasurer or, for local school districts and intermediate school districts, by the state board of education.

(5) This act shall not be interpreted to mandate the development or adoption by a local unit of a line-item budget or line-item general appropriations act.

(6) The legislative body shall determine the amount of money to be raised by taxation necessary to defray the expenditures and meet the liabilities of the local unit for the ensuing fiscal year, shall order that money to be raised by taxation, within statutory and charter limitations, and shall cause the money raised by taxation to be paid into the funds of the local unit.

(7) Except as otherwise permitted by section 102 of the state school aid act of 1979, 1979 PA 94, MCL 388.1702, or by other law, the legislative body shall not adopt a general appropriations act or an amendment to that act which causes estimated total expenditures, including an accrued deficit, to exceed total estimated revenues, including an available surplus and the proceeds from bonds or other obligations issued under the fiscal stabilization act, 1981 PA 80, MCL 141.1001 to 141.1011, or the balance of the principal of these bonds or other obligations.

MCL 141.437:

Sec. 17. (1) Except as otherwise provided in section 19, a deviation from the original general appropriations act shall not be made without amending the general appropriations act. Subject to section 16(2), the legislative body of the local unit shall amend the general appropriations act as soon as it becomes apparent that a deviation from the original general appropriations act is necessary and the amount of the deviation can be determined. An amendment shall indicate each intended alteration in the purpose of each appropriation item affected by the amendment. The legislative body may require that the chief administrative officer or fiscal officer provide it with periodic reports on the financial condition of the local unit.

(2) If, during a fiscal year, it appears to the chief administrative officer or to the legislative body that the actual and probable revenues from taxes and other sources in a fund are less than the estimated revenues, including an available surplus upon which appropriations from the fund were based and the proceeds from bonds or other obligations issued under the fiscal stabilization act, 1981 PA 80, MCL 141.1001 to 141.1011, or the balance of the principal of these bonds or other obligations, the chief administrative officer or fiscal officer shall present to the legislative body recommendations which, if adopted, would prevent expenditures from exceeding available revenues for that current fiscal year. The recommendations shall include proposals for reducing appropriations from the fund for budgetary centers in a manner that would cause the total of appropriations to not be greater than the total of revised estimated revenues of the fund, or proposals for measures necessary to provide revenues sufficient to meet expenditures of the fund, or both. The recommendations shall recognize the requirements of state law and the provisions of collective bargaining agreements.

MCL 141.438:

Sec. 18. (1) A member of the legislative body, chief administrative officer, administrative officer, or employee of the local unit shall not create a debt or incur a financial obligation on behalf of the local unit unless the debt or obligation is permitted by law.

(2) The chief administrative officer may cause the appropriations made by the legislative body for the local unit and its budgetary centers to be divided into allotments if the allotments are based upon the periodic requirements of

the local unit and its budgetary centers.

(3) Except as otherwise provided in section 19, an administrative officer of the local unit shall not incur expenditures against an appropriation account in excess of the amount appropriated by the legislative body. The chief administrative officer, an administrative officer, or an employee of the local unit shall not apply or divert money of the local unit for purposes inconsistent with those specified in the appropriations of the legislative body.

(4) No duties shall be delegated to the chief administrative officer that diminish any charter or statutory responsibilities of an elected or appointed official.

MCL 141.439:

Sec. 19. (1) A member of the legislative body, the chief administrative officer, an administrative officer, or an employee of a local unit shall not authorize or participate in the expenditure of funds except as authorized by a general appropriations act. An expenditure shall not be incurred except in pursuance of the authority and appropriations of the legislative body of the local unit.

(2) The legislative body in a general appropriations act may permit the chief administrative officer to execute transfers within limits stated in the act between appropriations without the prior approval of the legislative body.

MCL 141.440:

Sec. 20. A violation of sections 17 to 19 by the chief administrative officer, an administrative officer, employee, or member of the legislative body of the local unit disclosed in an audit of the financial records and accounts of the local unit in the absence of reasonable procedures in use by the local unit to detect such violations shall be filed with the state treasurer and reported by the state treasurer to the attorney general. For local and intermediate school districts, the report of a violation shall be filed with the state superintendent of public instruction instead of the state treasurer. The attorney general shall review the report and initiate appropriate action against the chief administrative officer, fiscal officer, administrative officer, employee, or member of the legislative body. For the use and benefit of the local unit, the attorney general or prosecuting attorney may institute a civil action in a court of competent jurisdiction for the recovery of funds of a local unit, disclosed by an examination to have been illegally expended or collected as a result of malfeasance and not accounted for as provided in sections 17 to 19, and for the recovery of public property disclosed to have been converted or misappropriated.

§ 1. Judicial power in court of justice; divisions

Sec. 1. The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

§ 23. Judicial vacancies, filling; appointee, term; successor; new offices

Sec. 23. A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term. Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law. **The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.**

(emphasis added)

Mich. Comp. L. §600.226(1)

Sec. 226. (1) The supreme court may authorize any retired judge from any court to perform judicial duties in any court in the state. The authorization may be for a period or periods as the supreme court shall designate with the consent of the retired judge.

Judicial Conference Rules

2) The directors of the conference shall consist of the chief justice, as chairman, the court administrator, as secretary, **the president of the Michigan Judges Association**, the president of the State Bar, the president of the State Bar Foundation, the attorney general of Michigan, the chairman of the senate judiciary committee, the chairman of the house judiciary committee, 3 other members of the conference designated, with the approval of the Supreme Court, by the chief justice, and such others as the chief justice, with the approval of the Supreme Court, may from time to time determine.

Canon 3 A Judge Should Perform the Duties of Office Impartially and Diligently

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities:

***

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(8) A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but the judge should bear in mind that undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto.

Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies that are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, the judge

should avoid a controversial manner or tone.

A judge should avoid interruptions of counsel in their arguments except to clarify their positions, and should not be tempted to the unnecessary display of learning or a premature judgment.